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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT STEINBUCH,

Petitioner,

v.

HYPERION BOOKS,
DISNEY PUBLISHING WORLDWIDE,
and
HOME BOX OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Steinbuch sued non-resident corporate defendants in a federal diversity action for disclosure of private facts published by Hyperion and Disney in a book entitled *The Washingtonienne*, subsequently optioned to Home Box Office for creation of a television program. The District Court dismissed as to Disney based on its self-serving claim that it was not directly involved in the production of the book and remanded for jurisdictional discovery as to Hyperion. The court also dismissed the claim against HBO for failure to state a cause of action for which relief could be granted.

I.

WHETHER PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY MEANINGFUL OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE THIRD AND SIXTH CIRCUITS IN *THEUNISSEN v. MATTHEWS*, 955 F.3d 1454, 1459 (3rd Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996).

II.

WHETHER THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).

III.

WHETHER THE EIGHTH CIRCUIT ERRED IN UPHOLDING DISMISSAL OF PETITIONER'S ACTION AGAINST HOME BOX OFFICE (HBO) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WHERE PETITIONER SUED FOR INJUNCTIVE RELIEF TO PREVENT HBO FROM PRODUCING AND AIRING A TELEVISION SERIES BASED ON *THE WASHINGTONIENNE* THAT WOULD EXPOSE HIM TO FURTHER VIOLATIONS OF HIS RIGHT OF PRIVACY.

TABLE OF CONTENTS

Questions presented for review . . . . . i-ii

Table of cases and authorities . . . . . v-vi

Opinions below 1

Jurisdiction 1

Constitutional and Statutory Provisions. 1

Statement of the Case 3

Summary of the Facts 3

Procedural History of the Case. 4

Reasons for Granting the Writ 7

I. PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY MEANINGFUL OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT

THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE THIRD AND SIXTH CIRCUITS IN *THEUNISSEN v. MATTHEWS*, 955 F.3d 1454, 1459 (3rd Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996).

Summary of material facts 7

Disposition in the Eighth Circuit. 10

Argument and Authorities. 11

II. THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).

Summary of Material Facts. 16

Disposition in the Eighth Circuit. 18

Argument and Authorities 19

III. THE EIGHTH CIRCUIT ERRED IN UPHOLDING DISMISSAL OF PETITIONER'S ACTION AGAINST HOME BOX OFFICE (HBO) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WHERE PETITIONER SUED FOR INJUNCTIVE RELIEF TO PREVENT HBO FROM PRODUCING AND AIRING A TELEVISION SERIES BASED ON *THE WASHINGTONIENNE* THAT WOULD EXPOSE HIM TO FURTHER VIOLATIONS OF HIS RIGHT OF PRIVACY.

Summary of Material Facts 31

Disposition in the Eighth Circuit. 32

Argument and Authorities 32

Conclusion and Prayer for Relief 42

TABLE OF CASES AND AUTHORITIES

United States Supreme Court decisions:

Bell Atlantic Corporation v. Twombly, 127 S.Ct. 1955 (2007). 33-34, 39-40

Calder v. Jones, 465 U.S. 783 (1984) 24, 25, 30

Conley v. Gibson, 355 U.S. 41(1957). 33

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). . 13, 19, 21, 30

Jenkins v. McKeithen, 395 U.S. 411(1969) 26, 33

Keeton v. Hustler, Inc., 465 U.S. 770 (1984). . . *passim*

Lower federal court decisions

Compuserve, Inc. v. Patterson, 89 F.3d 1657 (6th Cir. 1996). 7, 15

Gordy v. Daily News Sales, L.P., 95 F.3d 829 (9th Cir. 1996). 21-22

Steinbuch v. Hyperion, et al., 518 F.3d 580 (8th Cir. 2008). . . . . *passim*

Theunissen v. Matthews, 955 F.3d 1454 (3rd Cir. 1994). 7, 15

State court decisions

City of Dover v. City of Russellville, 215 S.W.3d 623 (Ark. 2005). 39

Statutory and rules provisions

U.S. Const., amend. XIV 1

28 U.S.C. § 1254(1). 1

28 U.S.C. § 1332 . . . . . 1-2, 15, 16, 41

Ark. Code Ann. § 16-58-120 (1987, as amended). . . . 2

Fed. R. Civ. Proc. 8(a)(2). 34

Fed. R. Civ. Proc. 12(b)(6) 4, 6

Fed. R. Civ. Proc. 12(e). 38

OPINION BELOW

The Eighth Circuit panel's opinion is published. *Steinbuch v. Hyperion, et al.*, 518 F.3d 580 (8th Cir. 2008). A copy of the opinion is appended to this petition as Exhibit A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The Eighth Circuit issued its decision on March 6, 2008, and denied rehearing on April 10, 2008. The order denying rehearing is appended to this petition as Exhibit B. This petition is timely if filed on or before July 9, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . ."

28 U.S.C. § 1332 provides, in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and is between··

(1) citizens of different states . . .

(c) For the purposes of this section and section 1441 of this title–

(1) a corporation shall be deemed to be a city of any State by which it has been incorporated and of the State where it has its principal place of business . . . .

The Arkansas long-arm jurisdiction statute, Ark. Code Ann. § 16-58-120 (1987, as amended) provides, in pertinent part:

(a) Any cause of action arising out of acts done in this state by an individual in this state or by an agent or servant in this state of a foreign corporation may be sued upon in this state, although the defendant has left this state, by process served upon or mailed to the individual or corporation outside this state.

STATEMENT OF THE CASE

Petitioner Steinbuch filed a diversity action in the United States District Court for the Eastern District of Arkansas against non-resident defendants based on the publication of a book resulting in disclosure of facts invading his privacy.

Summary of Facts

Steinbuch was employed by the United States Senate as a staff counsel to the Senate Judiciary Committee and lived in the District of Columbia area. He entered into a social relationship with another Senate staffer, Jessica Cutler, that developed into an intimate relationship. In 2004, Cutler created a website at which she detailed their ongoing relationship, as well as that involving five other men.

When Steinbuch learned of her disclosures, he demanded that she cease future publication of intimate details of their relationship. Cutler not only refused, but she entered into a publishing agreement with Hyperion Books, an imprint of Disney Worldwide Publishing that publishes work having adult content, including sexually-explicit material. Her book, *The Washingtonienne*, was marketed as a factually-based, *roman a clef*, purportedly describing her sexual escapades with men associated with Washington D.C. Hyperion advertised the book as a "who's who" and invited readers to determine the "thinly-disguised"

identities of those in the book.

Contemporaneous with the publication of the book (portrayed in the major press, such as the New York Times, as a Disney-product) in June, 2005, Steinbuch took up residence in Arkansas, having accepted a teaching position at the University of Arkansas at Little Rock School of Law. Following publication of Cutler's book under the Hyperion imprint and its distribution throughout Arkansas, Steinbuch learned, also through the popular media, that the rights to create a television series based on *The Washingtonienne* had been purchased by Home Box Office. The HBO project was being produced by Sarah Jessica Parker, who had previously starred in the successful television series, Sex and the City.

Procedural History of the Case

Steinbuch filed a diversity action in the Eastern District of Arkansas against Cutler, individually, and four non-resident corporate defendants, Disney, Hyperion, Time Warner and Home Box Office, asserting long-arm jurisdiction against all defendants under Arkansas law.

All defendants moved to dismiss for lack of jurisdiction. Time Warner and Home Box Office also moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The defendants also moved to stay discovery pending ruling

on their dismissal motions. Petitioner opposed a stay of discovery, arguing in his brief the necessity for conducting discovery to establish jurisdictional facts. The following day the District Court entered an order staying all discovery.

The District Court then granted the motions of Disney and Hyperion to dismiss for lack of personal jurisdiction, opining that the case should have been filed in Washington, D.C., because that was the location of the injury and Steinbuch's residence at the time of Cutler's disclosures in her webblog. A copy of the District Court's order is appended to this petition as Exhibit C. Steinbuch gave notice of appeal to the Eighth Circuit.

After the appeal had been docketed, Cutler filed for personal bankruptcy in New York and the appeal was stayed as to her. The Circuit Court denied the motions of the corporate defendants to stay the appeal in its entirety and the case proceeded to oral argument and disposition.

During the course of the appeal Time Warner disclosed for the first time that the wholly-owned subsidiary that had contracted for distribution of *The Washingtonienne* had been sold to another corporation, thus asserting that Petitioner had sued the wrong entity. Petitioner subsequently filed suit in the Eastern District of Arkansas against the newly-identified corporation that assumed the contract for

national distribution of the offending book.

The Eighth Circuit panel affirmed the dismissal for lack of jurisdiction as to Disney, but remanded the case for discovery on the issue of general jurisdiction as to Hyperion. It also upheld the Rule 12(b)(6) dismissal as to Time Warner and Home Box Office.

Following remand, Steinbuch moved in the District Court to transfer the case to the District of Columbia based on the court's findings regarding that forum in this case. In response, Hyperion argued that Steinbuch could not establish jurisdiction over it in the District of Columbia. The District Court denied the motion to transfer.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE THIRD AND SIXTH CIRCUITS IN *THEUNISSEN v. MATTHEWS*, 955 F.3d 1454, 1459 (3rd Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996).

Summary of Material Facts

Petitioner Steinbuch based his claims against Disney for invasion of privacy on the actions of Disney and Hyperion in publishing *The Washingtonienne*. [Exhibit D; First Amended Complaint, at ¶ 17].

In response to Steinbuch's allegations in his amended complaint, Disney responded by moving to dismiss for lack of personal jurisdiction. Disney argued that it had no place of business in Arkansas, no employees in the state, neither owned nor leased property in the state, and otherwise did not avail itself

of the privilege of conducting business in the state, as the District Court found in its dismissal order. [Exhibit C; Order, 20].

Moreover, Disney offered an affidavit disclaiming any involvement in the publication of the Cutler book. Based on the Disney affidavit, the District Court explained:

> Disney produced an affidavit from its senior vice president stating that Disney is the parent of Buena Vista Books and does not control the business operations and affairs of Buena Vista Books. The affidavit further states that Disney did not publish *The Washingtonienne*, did not enter into a contract with Cutler, never paid Cutler, and had nothing to do with distribution of the book. Jurisdiction over Disney does not automatically follow because of the actions of its wholly-owned subsidiary.

[Exhibit C; Order, 18-19].

Accepting Disney's untested affidavit as conclusive, the District Court held:

> Steinbuch has failed to make a prima facie showing that Disney had continuous and systematic contacts with Arkansas to establish general personal jurisdiction, or that it engaged in conduct that caused an injury in this state.

[Exhibit C; Order, 20].

Steinbuch had offered a number of newspaper articles directly linking Disney to the publication of the Cutler book, but the District Court refused to consider that evidence–the only evidence that Steinbuch could garner given the District Court's stay of all discovery–because the newspaper articles *might* not be admissible during a trial. *Id.* The District Court stated:

> To rebut this affidavit, Steinbuch offers several newspaper articles from the Cleveland Plain Dealer, The Hartford Courant, the New York Post-Standard, the New York Times, and other news sources that *connect* Disney with the publication of Cutler's book. Newspaper articles are not *generally* admissible evidence, and are not sufficient to overcome sworn testimony from a witness who has personal knowledge of the facts. Once Disney attached the affidavit to its motion, Steinbuch was obliged to offer evidence of jurisdiction, in addition to the allegations contained in his complaint.

Id. at 19-20. (Emphasis added). Paradoxically, the District Court refused Steinbuch any discovery while requiring Steinbuch to produce evidence in addition to that which he already produced. Additionally, Disney admitted that it maintained an agent for service of

process in Arkansas. *Id.* at 20.

Disposition in the Eighth Circuit

The Eighth Circuit upheld the District Court's dismissal of the action against Disney based entirely on the District Court's acceptance of the affidavits of Disney and Hyperion executives disclaiming any involvement of Disney in the publication of the book–untested by discovery whatsoever. The Eighth Circuit held:

> Affidavits by Hyperion and Disney executives stated that while Disney is Buena Vista's parent, they are distinct corporate entities with separate bank accounts and books and records and Disney does not control the day to day affairs of Buena Vista. Disney maintained no registered agent, bank accounts, telephone listings, real estate, or offices in Arkansas at the time Steinbuch filed suit. Steinbuch contends, however, that Disney engages in continuous and systematic business activity in Arkansas, pointing to its cable television programs in the state and the registered agent for process Disney installed in September 2006.

Steinbuch v. Cutler, 518 F.3d at 589.

The Circuit Court went further, rejecting both the newspaper articles and the distribution agreement

cited by Steinbuch identifying Disney as involved in the production of the offending book. And after not allowing any discovery whatsoever, the Circuit Court found that Steinbuch provided no "affidavits, testimony, or documents" rebutting Disney's claims that Hyperion, its wholly-owned subsidiary, operated with complete independence of Disney in the publishing of the Cutler book. *Id.* Consequently, the Circuit Court concluded:

> By not furnishing factual evidence in response to Disney's denial of continuous and systematic contacts in the state, Steinbuch fell short of establishing a prima facie case of general jurisdiction.

518 F.3d at 590.

Argument and Authorities

Notwithstanding the District Court's recognition that "newspaper articles from the Cleveland Plain Dealer, The Hartford Courant, the New York Post-Standard, the New York Times, and other news sources that *connect* Disney with the publication of Cutler's book," [Exhibit C; Order, 19], the Eighth Circuit accepted the District Court's erroneous conclusions, based on the affidavits supplied by Disney and Hyperion, and held that Petitioner had failed to show that Disney had any connection to the lawsuit and, therefore, it could see "no justification for the

exercise of specific jurisdiction." 518 F.3d at 590. The courts below never allowed Steinbuch any discovery on this issue whatsoever.

Regarding general jurisdiction, the District Court conceded that all corporate defendants, including Disney, conduct business in the State of Arkansas: "Hyperion, Disney, HBO, and Time Warner sell their products or services in this state." [Exhibit C; Order, 13].

Applying this Court's holding in *Keeton v. Hustler, Inc.*, 465 U.S. 770 (1984), the holding that Disney conducts business in Arkansas should be sufficient for assertion of general jurisdiction. The Court explained:

> Where, as in this case, respondent Hustler Magazine, Inc., has *continuously and deliberately exploited* the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.

465 U.S. at 781 (emphasis added).

Whether Disney was directly involved in the publication of the Cutler book is clearly related to its potential liability, and Steinbuch made a prima facie case demonstrating that even without discovery. If the courts below found that evidence insufficient, they

should have granted discovery on this point. But in terms of general jurisdiction analysis, the fact that Disney does business in Arkansas is alone sufficient to rebut a motion to dismiss on jurisdictional grounds. *Id.* Similarly, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) the Court explained: "our focus is on whether a defendant's activity in the forum state is 'continuous and systematic.'"

Moreover, the denial of any opportunity to engage in any jurisdictional discovery at all deprived Steinbuch of the possibility of offering the very type of evidence demanded by the Circuit Court. The court concluded:

> Finally, the district court did not abuse its discretion by granting a stay of discovery against Disney because Steinbuch failed to rebut its affidavits denying corporate control over Hyperion and offered only speculative and conclusory assertions about Disney's contacts with the forum state.

518 F.3d at 590.

Petitioner does not contest the Circuit Court's observation that a parent corporation is not liable for acts solely committed by its wholly-owned subsidiary. Nor did Petitioner argue that Disney was subject to personal jurisdiction in Arkansas simply because its

subsidiary does business in the state and, therefore, is subject to personal jurisdiction in the state. *Id.* at 589. Petitioner, however, presented evidence of Disney's *direct* involvement in the production of the book, as well as its contacts with Arkansas. Petitioner could have produced more had it been given the opportunity to engage in any discovery.

Moreover, the trial court's order to stay discovery on motion of the defendants was entered the very day after Petitioner responded to their motions–explaining that it needed to engage in discovery on questions of jurisdiction. In this instance, the District Court abused its discretion in denying discovery that would have either permitted Steinbuch to support his claims against Disney, or resulted in his inability to do so, warranting dismissal of Disney for lack of jurisdiction after Petitioner was afforded a fair opportunity to question or counter Disney's self-serving affidavit. The District Court's improvident order staying discovery frustrated Petitioner's reasonable expectation that he could rely on Arkansas' long-arm statute.

The Eighth Circuit's position creates a litigation *Catch 22* in which the plaintiff is required to produce evidence that might be obtained through discovery, but is denied the opportunity to do so because it could not rebut the self-serving affidavits relied upon by the non-resident corporate defendants.

Reliance on a defendant's self-serving affidavit on the issue of minimum contacts permits a non-resident defendant to escape long-arm jurisdiction simply by denying the extent of its business presence in the jurisdiction, as the Third Circuit observed in *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir.1991). The trial court should not defer to such affidavits in order "to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts." *Id.* at 1459. Later, in *CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), the Sixth Circuit reiterated this view, holding that dismissal for lack of jurisdiction is proper "only if all the specific facts which the plaintiff (CompuServe) alleges collectively fail to state a prima facie case for jurisdiction." *Id.* at 1262.

The District Court's acceptance of Disney's self-serving affidavit denying jurisdictional facts, in concert with its stay of discovery represents a threat to the use of diversity and long-arm jurisdiction. The Circuit Court's published decision provides precedent effectively permitting any non-resident defendant to escape jurisdiction under Section 1332 by simply offering an affidavit disclaiming jurisdictional facts and moving to stay discovery.

The Eighth Circuit's approach in Steinbuch conflicts with that taken by the Third and Sixth Circuits, warranting this Court's grant of certiorari.

II.

THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).

Summary of Material Facts

Petitioner Steinbuch brought suit in the Eastern District of Arkansas against Hyperion based upon its publication and marketing of *The Washingtonienne*. He established residency in the state in June, 2005, after accepting an offer of a teaching position at the University of Arkansas at Little Rock and moving there from Washington, D.C. Hyperion published the book in June, 2005, and added it to its long list of titles available at book stores and libraries throughout the state.

Steinbuch brought his action in federal court pursuant to 28 U.S.C. § 1332(a)(1) based on diversity of citizenship. Complete diversity exists as to Steinbuch and all defendants. The District Court

dismissed Petitioner's claim against Hyperion based on lack of jurisdiction. The Circuit Court observed:

> The district court noted that all the corporate defendants sold their products or services in Arkansas and analyzed whether it could exercise personal jurisdiction over them under either specific or general personal jurisdiction. It found that *The Washingtonienne* and other books published by Hyperion were being sold in Arkansas bookstores. There was no evidence that Hyperion had mounted a large advertising campaign, and the court observed that only about fifty copies had been sold to wholesale and retail accounts in Arkansas. The district court concluded that the exercise of personal jurisdiction over Hyperion would be unwarranted because its contacts with Arkansas were too attenuated and the injury to Steinbuch did not occur as a result of its activities directed at the forum state, especially since Steinbuch had moved to Arkansas only after publication of the novel.

Steinbuch, 517 F.3d at 585. Of course, these findings were made without affording Petitioner any discovery to augment the evidence that he was able to garner solely from public sources.

Disposition in the Eighth Circuit

The Eighth Circuit specifically noted that the trial court refused to find jurisdiction in Arkansas, and the district court had opined that the action should have been brought in Washington, D.C., "where the novel's events took place," and for convenience of witnesses. 518 F.3d at 585.

In denying specific jurisdiction, the panel held:

> Steinbuch's cause of action appears to have no direct connection with the forum state or to have arisen out of or relate to Hyperion's activities in Arkansas.

Steinbuch v. Cutler, 518 F.3d at 587.

Regarding general jurisdiction, the Circuit Court observed that Steinbuch had shown:

> Steinbuch produced a list of approximately thirty different Hyperion book titles available in a particular Arkansas bookstore, affidavits by several individuals who purchased Cutler's novel in Arkansas, and an affidavit declaring that The Washingtonienne is available at all major bookstores in Arkansas, as well as through the state's central public library system.

Id. at 587. Instead of finding general jurisdiction, the panel remanded for additional discovery on the question of general jurisdiction.

Argument and Authorities

A. The general jurisdiction issue

The Eighth Circuit initially erred in not finding long-arm jurisdiction despite the showing that Hyperion did business in Arkansas. Here, the District Court expressly found: "Hyperion, Disney, HBO, and Time Warner sell their products or services in this state." [Exhibit C; Order, 13]. This finding should have effectively ended the court's analysis for purposes of general jurisdiction under *Keeton v. Hustler, Inc.*, 465 U.S. 770 (1984), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

The cornerstone of general jurisdiction, according to the Court's decision in *Keeton* is the fact that a non-resident corporation "is carrying on a 'part of its general business' in the forum state." *Id.* at 780. The *Keeton* Court focused on a commercial entity's decision to exploit the state as a market as a determining factor in assessing the fairness of asserting long-arm jurisdiction:

> Where, as in this case, respondent Hustler Magazine, Inc., has *continuously and deliberately exploited* the New Hampshire

> market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.

465 U.S. at 781 (emphasis added).

But, consistent with its misunderstanding of general jurisdiction, the District Court proceeded to reject jurisdiction as to Hyperion and Disney, applying the criteria that actually govern specific jurisdiction. Instead of considering the extent of Hyperion's business activity in Arkansas—as reflected in the significant documentary evidence supplied by Steinbuch—the District Court focused only upon the book underlying Steinbuch's privacy claims, concluding: "There is no indication that Hyperion mounted a large advertising campaign for *The Washingtonienne* in Arkansas, or hired an agent to distribute the book here." [Exhibit C; Order, 18].

The District Court's analysis was both legally and factually incorrect. Whether Hyperion mounted an advertising campaign for Cutler's book within Arkansas may be relevant to specific jurisdiction (to be established *after* discovery), but not general jurisdiction.

The District Court also minimized Hyperion's relationship with Arkansas by noting Hyperion's untested assertion that there were relatively few sales of *The Washingtonienne* in Arkansas, a fact–if proven

true after discovery–that would be significant perhaps for specific personal jurisdiction, but not for general jurisdiction. In concluding that Hyperion's contacts with Arkansas are "attenuated," the District Court improperly restricted its analysis to the marketing and sales of the Cutler book. The analysis was inconsistent with its finding that Hyperion and Disney "sell their products" in Arkansas and irrelevant to the question of whether these Defendants have "continuously and deliberately exploited" the Arkansas market, the language used by the Supreme Court in *Keeton v. Hustler*.

In reviewing the District Court, the Eighth Circuit panel observed the district court *improperly* limited its consideration to the relatively small number of sales of *The Washingtonienne*, rather than examining the extent of Hyperion's business in the state. 518 F.3d at 587. As in *Keeton*, total sales of the offending publication are not dispositive on the issue of contacts; rather, it is the continuing business relationship of the non-resident corporation with the forum that governs its amenability to process in the forum In *Helicopteros*, this Court observed:

> Percentage of a company's sales in a given state are generally irrelevant. Instead, our focus is on whether a defendant's activity in the forum state is "continuous and systematic."

466 U.S. at 414. See *Gordy v. Daily News Sales, L.P.*,

95 F.3d 829, 833-34 (9th Cir. 1996).

Acknowledging that Hyperion marketed its products in Arkansas through its national distribution agreement with Time Warner Book Group, the panel concluded:

> It thus appears that Hyperion may have been involved in the promotion and marketing of its books and might have reasonably expected their distribution in Arkansas.

518 F.3d at 588.

Further, the panel found that Hyperion would not be oppressively burdened with having to defend in an Arkansas court:

> The burden of litigation to a corporate publisher such as Hyperion, which is incorporated in California and derives profits from the sale of its books across the country, would not appear to be so great as to require dismissal.

Id.

Despite these conclusions, the panel did not reverse the district court and find jurisdiction; rather, it ordered a remand for additional discovery, holding that the lower court abused its discretion in dismissing without affording Petitioner the opportunity to engage

in any discovery. *Id.*

While the panel's disposition might appear adequate because Steinbuch is not foreclosed entirely from proceeding against Hyperion, it nevertheless demonstrates an unwillingness to apply this Court's clear directive in *Keeton*. Petitioner is not assured that the lower court will find any additional facts developed in discovery sufficient to permit the cause to proceed on the merits (particularly given the District Court's recent apparent reversal of its position on jurisdiction in Washington D.C.) and, after additional expense and delay while his reputation continues to be injured through the sale of the book, he may still be forced to appeal yet another dismissal order to the Circuit, again relying on *Keeton*.

B. The issue of specific jurisdiction

Second, the lower courts misapplied the doctrine of specific personal jurisdiction in denying Petitioner's claim that the publication and marketing of the book in Arkansas rendered Hyperion liable for suit in the Arkansas district court.

The courts below improperly focused their jurisdictional analysis on factors that are wholly inconsistent with this Court's approach to the exercise of long-arm jurisdiction over non-resident defendants in diversity actions in a number of critical respects. In doing so, the courts departed from the Court's long-

standing support for diversity jurisdiction in actions involving non-resident corporate defendants, as evidenced by the holding in *Keeton*.

1. Steinbuch's residence

First, the panel rejected Steinbuch's specific jurisdiction argument in observing that he had failed to show that Hyperion deliberately directed its activities at him as a result of his residence in Arkansas. Finding that Petitioner had not been definite in his allegations concerning his actual date of establishing residence in Arkansas after obtaining employment in Little Rock on June 1, 2005, the panel essentially concluded that he could not show that Hyperion had deliberately targeted him as a resident of the state. It concluded:

> To sustain his argument, Steinbuch would have to show that Hyperion knew that "the brunt of the injury would be felt by [him] in the State in which [he] lives and works" and intentionally targeted the forum state. See Calder v. Jones, 465 U.S. 783, 789-90, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

518 F.3d at 586. But this reading of *Calder v. Jones* is improper. The Court did not hold that reliance on specific jurisdiction *requires* the showing quoted from *Calder*; instead, the Court was responded to the claim by the editor and author of the defamatory article that

they lacked any intent of publishing their work for distribution in California. This Court inferred that they would have been well-aware of the plaintiff's residence in California and the national distribution of the publisher of the article, such that where there was an intentional targeting of the forum state, assertion of long-arm jurisdiction was proper for redress of the plaintiff's injured reputation in California.

The panel distorted the application of *Calder v. Jones* to hold that a finding of specific jurisdiction requires intentional action on the part of the defendant to target the plaintiff on the basis of plaintiff's residency. It does not.

Further, Steinbuch alleged that he was a resident of Arkansas in his First Amended Complaint filed on June 15, 2006. [Exhibit D]. The circuit also found that he had been employed as a law professor in Little Rock in June, 2005. 518 F.3d at 583-84. Nevertheless, the panel found this insufficient. 518 F.3d at 584, n. 4. Moreover, the imposition of a residence requirement in order to assert jurisdiction was absolutely without precedential support. Indeed, in *Keeton,* the Court concluded that diversity was proper where the plaintiff was *never* a resident of New Hampshire and merely brought the action there to avail herself of the benefits of its six-year statute of limitations. 465 U.S. at 773.

Second, the lower courts completely disregarded

the effect of Arkansas substantive law, as found by the District Court, which recognizes the "multiple publication rule" in which each publication of defamatory material or disclosures invading privacy constitutes a separate cause of action. [Exhibit C; Order,11-12] Since each transaction involving *The Washingtonienne* actually results in an independent cause of action under the "multiple publication rule" of Arkansas law, Steinbuch's actual date of initial residence in Arkansas would be irrelevant since he clearly pleaded that he is a resident in his First Amended Complaint and the disclosure of private facts continues to occur while the book remains available.

Third, relying on a liberal interpretation of the pleading, *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969), Steinbuch' assertion of Arkansas residence in his First Amended Complaint and proof that he had been employed to teach in Little Rock on June 1, 2005–concurrent with the courts' improperly fixed date of publication in a multiple-publication rule state–was adequate to show that Petitioner was a resident at the time of publication or, at least, post-publication distribution of the book in Arkansas. Nevertheless, the issue of Steinbuch's residence was actually a red herring, misleading the lower courts in their conclusions that he could not assert specific long-arm jurisdiction afforded by Arkansas law.

2. Facts underlying the cause of action

The panel and the District Court both confused the contents of the book with the cause of cation arising out of the publication and sale of the book. The panel noted:

> None of the events described in the novel took place in Arkansas, and Steinbuch has failed to show that Hyperion's contacts with Arkansas and the relationship between his cause of action and those contacts are sufficient to justify the exercise of specific jurisdiction.

518 F.3d at 597. The *events* in the book are irrelevant to whether Hyperion sold the book in Arkansas. Indeed, this Court in *Keeton* held:

> [W]e have upheld the assertion of jurisdiction where such contacts were entirely lacking. In Perkins v. Benguet Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), none of the parties was a resident of the forum State; indeed, *neither the plaintiff nor the subject-matter of his action had any relation to that State.* Jurisdiction was based solely on the fact that the defendant corporation had been carrying on in the forum "a continuous and systematic, but limited, part of its general business." Id., at 438, 72 S.Ct., at 414.

465 U.S. at 779-80.

Thus, the fact that the District Court found that Hyperion and Disney do regularly carry on some part of their business activities within Arkansas, albeit limited, is sufficient to establish general jurisdiction in this case.

Moreover, what is particularly bizarre, however, is the lower courts' finding that Steinbuch cannot properly assert jurisdiction in Arkansas because the "[n]one of the events described in the novel took place in Arkansas" This statement discloses an almost complete misperception of the nature of Petitioner's claim. He is not suing over the events described in the novel. He is suing over the disclosure of those events in violation of his right of privacy in their publication by Disney and Hyperion of Cutler's book, *The Washingtonienne*. Obviously, the events of the book could have taken place anywhere, and the false light material in the book took place nowhere.

The events giving rise to Petitioner Steinbuch's claims involve the publication of the book, its marketing and sale in Arkansas and elsewhere, and the prospective creation of a television series by HBO based on the same private information disclosed in the book.

C. The remand for jurisdictional discovery

Petitioner believes the Eighth Circuit's analysis, like that of the District Court, not only fails to properly differentiate between the concepts of general and specific jurisdiction and the necessary factual elements supporting each, but that the lower courts imposed an arbitrary division between the two concepts as applied in practice. Steinbuch presented sufficient facts to support his claims using either the general or specific approach to personal jurisdiction in the long-arm context. But, the lower courts both concluded that he was foreclosed from relying on specific jurisdiction based on considerations that do not find support in this Court's decisions.

The artificial intellectual divide perceived by the lower courts is apparent in the remand order. The panel held:

> We reverse the final judgment entered in favor of Hyperion Books, and remand for further proceedings not inconsistent with this opinion and for discovery on the issue of whether general personal jurisdiction exists over Hyperion.

518 F.3d at 591. In so holding, the lower court precluded discovery aimed at proving facts warranting assertion of long-arm jurisdiction under the theory of specific personal jurisdiction altogether. Regardless of

what further discovery might disclose, the Eighth Circuit's order would appear to bar reliance on specific discovery in the event the District Court again dismissed based on general discovery.

While it may be difficult to construct a theory on these facts that would support specific, but not general, jurisdiction, the Eighth Circuit's approach effectively bars this possibility. In so holding, the lower courts have essentially transformed the different modes of analysis reflected by the general and specific jurisdiction concepts into something like theories of causes of action. But nothing in the decisions of this Court draws such arbitrary lines in the mode of analysis, based on Petitioner's reading of *Keeton, Helicopteros* and *Calder.*

The Court should grant certiorari in this case to review the Eighth Circuit's newly-announced published and precedential decision that draws a fixed line of delineation between the two analytical frameworks this Court has recognized in assessing claims of personal jurisdiction. Otherwise, the Eighth Circuit's decision will likely stimulate non-resident defendants to rely on factually-inaccurate elements of the two theories in an effort to distort the Court's intended approach to assertion of long-arm jurisdiction consistent federal due process.

III.

THE EIGHTH CIRCUIT ERRED IN UPHOLDING DISMISSAL OF PETITIONER'S ACTION AGAINST HOME BOX OFFICE (HBO) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WHERE PETITIONER SUED FOR INJUNCTIVE RELIEF TO PREVENT HBO FROM PRODUCING AND AIRING A TELEVISION SERIES BASED ON *THE WASHINGTONIENNE* THAT WOULD EXPOSE HIM TO FURTHER VIOLATIONS OF HIS RIGHT OF PRIVACY.

Summary of Material Facts

The District Court considered the pleadings and supporting affidavits only offered by the defendants in ruling on the their motions to dismiss Steinbuch's complaint. [Exhibit C]. Steinbuch was unable to directly respond to these self-serving affidavits because the court, prior to the initiation of discovery under F.R.C.P. 26, preemptively stayed all discovery pending disposition of the motions to dismiss. 518 F.3d at 584-85.

HBO admitted that it had purchased an option to produce a television program based on Cutler's book, but asserted that it had not yet begun production of a television show. [Brief in Support of the Motion to Dismiss of Home Box Office, Inc. and Time Warner, Inc. at 2] In response, Steinbuch presented the only

evidence that he could gather under the District Court's ban on discovery–significant evidence from news services that HBO was actively producing a television show.

Disposition in the Eighth Circuit

The circuit court concluded that because HBO had not yet "published anything," Steinbuch had not suffered any injury "by the yet undeveloped television series." *Steinbuch v. Cutler*, 518 F.3d at 591. It then found Steinbuch's claim to be speculative, rejecting his argument that he is entitled to injunctive relief "against the mere possibility of a future television series." *Id.* Further, it held that the lower court did not abuse its discretion in denying his request for any discovery against HBO because his complaint lacked sufficient allegations to state a claim." *Id.*

Argument and Authorities

Steinbuch sought injunctive relief against Home Box Office to prevent irreparable injury from the conversion of the book into a television program for publication to a national audience on the cable channel.

In its brief in support of the District Court's order staying all discovery, HBO explained the process involved in the development of a television series and stated that it had not yet produced a show. Tellingly,

it never said that it would not or did not intend to produce such a show. The District Court's order staying all discovery prevented Steinbuch from developing additional evidence from HBO to establishing that, in fact, HBO has moved forward in its production, or engaged in specific planning for the creation of the program, as the news reports that Petitioner relied upon stated. That discovery would be highly relevant to Steinbuch's entitlement to relief.

The position of the Eighth Circuit and District Court apparently is that Petitioner Steinbuch has not asserted a claim for relief precisely because the proposed television series has not been aired. But the uncontroverted evidence before the District Court showed that Home Box Office had acquired rights to develop the proposed series and Steinbuch offered significant supporting evidence from the national media that HBO was actively developing the show.

In considering the sufficiency of pleadings, the general rule is that complaints are to be construed liberally in favor of the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). The dismissal of Petitioner Steinbuch's claim for failure to state a claim upon which relief could be granted violated the fundamental precept of federal pleading set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), as reaffirmed in *Bell Atlantic Corporation v. Twombly*, 127 S.,Ct. 1955, 1964-65 (2007). There, the Court summarized the requirements for an adequate

pleading under Rule 8(a)(2) of the Federal Rules of Civil Procedure:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, e.g., Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atlantic, 127 S.Ct. at 1964-65.

A review of Petitioner's allegations in his First Amended Complaint demonstrates that Petitioner has provided a sufficient factual basis for his claims, generally, and against HBO, specifically. A review of his First Amended Complaint, at ¶ 1, [Exhibit D] shows that he disclosed precisely the nature of his privacy action:

> This civil action is for invasion of privacy and infliction of emotional distress caused by the publishing of a book by the Defendants, and the serialization of that book, describing in graphic detail the intimate amorous and sexual relationship between Cutler and the Plaintiff, misappropriating Plaintiff's likeness, putting Plaintiff in false light, and intruding on Plaintiff's seclusion. Defendant's outrageous actions, constituted a gross invasion of his privacy and an intentional infliction of emotional distress, subjecting him to humiliation and anguish beyond that which any reasonable person should be expected to bear.

The Amended Complaint then included substantial, detailed factual allegations concerning the relationship between Cutler and Petitioner, including the specific nature of the disclosures resulting in the invasion of Petitioner's privacy giving rise to his cause of action. [Exhibit D, First Amended Complaint, at 2, ¶¶ 10-21]. These allegations included the approach taken by Hyperion in marketing the book, portraying it as a

"roman a clef exposing the scandalous truth" and crediting Cutler's "real life experience . . . that is sure to initiate a game . . . of Who's Who." ¶ 18.

Petitioner then specifically pleaded the relationship of the underlying cause of action to HBO:

> Home Box Office purchased from Defendant Cutler the rights to make the book into a TV series and has started production thereof, which again invades Plaintiff's right to privacy.

[Exhibit D, First Amended Complaint, at 4, ¶ 21].

In each paragraph alleging a distinct cause of action congnizable under Arkansas law Petitioner again complained of the actions of the Defendants in "creating a TV series." ¶¶ 23, 27, 29, 31.

Finally, Petitioner alleged that as a result of the disclosures invading his privacy, he had suffered "severe emotional distress, humiliation, embarrassment, anguish, pain and suffering," and had "damaged him relative to his community." ¶ 32.

These allegations were clearly sufficient to support Petitioner's claims for invasion of privacy under theories the District Court acknowledged were cognizable under Arkansas law. [Exhibit C; Order, 10-12].

Here, Steinbuch alleged specific facts relating the source of his injury: HBO's development of a television series based on the book also the subject of the suit. Presumably, if HBO completed development of the project and aired the program, the Circuit Court would have agreed that Petitioner would have a claim for damages for invasion of privacy under Arkansas law.

If Petitioner were seeking financial damages from HBO now, the lower courts might justifiably hold that his action is premature for the reasoning advanced by the Eighth Circuit. But, the court went further, holding that he did not state a claim upon which injunctive relief could be granted. Again, the Circuit Court concluded that because Steinbuch had not demonstrated the existence of a cause of action, "there would be no basis for injunctive relief against the mere possibility of a future television series based on Cutler's novel." 518 F.3d at 591.

The lower courts' hostility to Petitioner's claim for injunctive relief is unexplained and remarkable. There is no suggestion that Arkansas does not recognize his cause of action for invasion of privacy based on the multiple theories he alleged in his Amended Complaint, each of which was acknowledged by the District Court in its order and the Eighth Circuit. 518 F.3d at 590-91.

It appears, however, that the Circuit Court was

concerned that Steinbuch's suit for injunctive relief would potentially implicate questions of prior restraint. In fact, the court specifically disclaimed any need to consider this constitutional issue in light of its affirmance of the dismissal: "We therefore need not discuss any potential First Amendment issues in respect to an injunction pertaining to these parties." *Id.* at 591, n. 5. The issue of prior restraint had never been raised by HBO in the trial court; however, Petitioner had specifically alleged that Cutler's disclosures comprising the basis of the proposed HBO television series, "were not made for any purpose relating to the dissemination of news or material published in the public interest and of no legitimate public concern." [Exhibit D, First Amended Complaint, at ¶ 24].

The lower courts distorted the application of pleading rules in rejecting Steinbuch's claim against HBO. The dismissal was upheld on the ground that Steinbuch had failed to plead sufficient facts to state a claim for relief. This was not a dismissal based on pleading deficiency, however, as HBO did not move to dismiss based upon inadequate pleading under Rule 12(e). Instead, the circuit court ruled: "Steinbuch's complaint is devoid of any factual support for his allegation that he has been injured by the yet undeveloped television series." 518 F.3d at 591.

The problem with this analysis is, however, that the very purpose of seeking injunctive relief is to

prevent an injury for which damages may not be an adequate remedy. In a very important sense, the improper disclosure of private facts injuring personal reputation will not likely be redressed by imposition of money damages. Certainly, the transposition of the disclosures in the published book into a television series by HBO would compound damages Petitioner has already suffered as a consequence of publication of Cutler's webblog and *The Washingtonienne* book.

Because Arkansas recognizes privacy-based causes of actions, Steinbuch was entitled to rely on these state law theories in bringing his diversity action in federal court. And, injunctive relief is commonly recognized in both federal and state actions. Arkansas law recognizes injunctive relief to prevent irreparable injuries, *City of Dover v. City of Russellville*, 215 S.W.3d 623 (Ark. 2005).

The position taken by the lower courts would require Petitioner to wait until HBO actually produces and airs the series and then sue for damages, instead of taking the responsible course of action and attempting to mitigate the damages to his reputation by seeking equitable relief to litigate the privacy issues raised in his complaint. In effect, the Eighth Circuit requires Steinbuch to suffer his injury before seeking redress designed to avoid the possibility of further injury.

The courts below clearly misapplied *Bell*

Atlantic Corporation v. Twombly, 127 S.Ct. at 1964-65 if its decision actually rests on insufficient pleading. Had that been the real issue, it should have been resolved with an order for more specific pleading upon a proper motion.

Instead, it appears that the courts were simply unimpressed with Petitioner's claims because he could not establish the likelihood that HBO would complete production of the television series. But, if that is true, then the proper resolution of the issue was not dismissal, but remand for additional discovery to permit Petitioner to force HBO to disclose its plans to proceed or the state of its progress in producing the series through routine discovery process.

The Court should grant the petition on this issue and summarily remand this cause because the application of the prior restraint doctrine to entertainment program is, itself, an issue that should be litigated on the merits. Privacy rights in light of technological advances should be subject to consideration in the context raised by Steinbuch in this action. Unless the circuit court's disposition is reversed, Steinbuch will not only be deprived of his right to litigate a recognized cause of action in an effort to avoid further personal injury, but consideration of this important issue will necessarily be delayed.

CONCLUSION AND PRAYER FOR RELIEF

The dismissal of Petitioner's claims in his diversity action against non-resident corporate defendants Disney and Hyperion reflects a distortion of this Court's long-arm jurisprudence, a distortion not redressed by the Eighth Circuit's remand limited to discovery on the question of general jurisdiction for Hyperion, based on the lower courts' acceptance of the unchallenged, self-serving affidavit of Disney denying all jurisdictional facts. The refusal to afford Petitioner any opportunity to develop additional facts by taking jurisdictional discovery as to Disney constitutes an abuse of discretion frustrating the policy clearly advanced by Section 1332 in creating diversity jurisdiction and the Arkansas long-arm jurisdiction statute in affording relief in that forum for injuries inflicted by non-resident defendants.

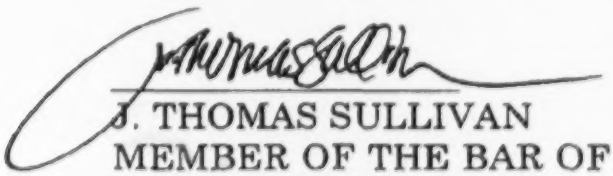
Moreover, the lower courts' summary treatment of Petitioner's claim for injunctive relief against HBO to prevent further injury of national scope to his reputation and privacy was wholly improper in light of the pleadings and admitted fact that HBO had optioned *The Washingtonienne* for production as a television series. Even if the question of injunctive relief may eventually raise a question of the application of the prior restraint doctrine, as applied to entertainment program and not news reporting, the mere possibility of a prior restraint question should not serve to deprive Petitioner of the opportunity of

litigating the factual issues of HBO's ultimate intent and actual progress in developing the television series.

Therefore, Petitioner prays the Court grant the writ and summarily reverse the judgment of the Eighth Circuit and rule for him on the question of jurisdiction as to Disney and Hyperion, or alternatively, remand for jurisdictional discovery as to both parties not limited to the application of the theory of general personal jurisdiction. Petitioner further prays the Court summarily reverse the judgment as to HBO and remand this cause for further proceedings.

In the alternative, Petitioner prays the Court grant the writ on all questions, set this cause for briefing and oral argument on the merits and upon hearing, reverse the judgment and remand for further proceedings.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT STEINBUCH,

Petitioner,

v.

HYPERION BOOKS,
DISNEY PUBLISHING WORLDWIDE,
and
HOME BOX OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

EXHIBIT A: EIGHTH CIRCUIT OPINION IN STEINBUCH v. CUTLER

EXHIBIT B: ORDER DENYING REHEARING

EXHIBIT C: DISTRICT COURT ORDER

EXHIBIT D: FIRST AMENDED COMPLAINT

EXHIBIT A: EIGHTH CIRCUIT OPINION IN *STEINBUCH v. CUTLER, ET AL*

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-1509

Robert Steinbuch,
Plaintiff - Appellant,
v.
Jessica Cutler; Hyperion Books; Disney Publishing Worldwide; Home Box Office; Time Warner;
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas
Submitted: January 14, 2008
Filed: March 6, 2008

Before LOKEN, Chief Judge, MURPHY, Circuit Judge, and JARVEY,[1] District Judge.

MURPHY, Circuit Judge.

Robert Steinbuch brought this action against Jessica Cutler and several corporate entities for invasion of privacy and intentional infliction of emotional distress arising from the publication by

1 The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa, sitting by designation.

Hyperion Books of Cutler's sexually explicit novel and the potential development of a future television series based on it. The district court[2] dismissed Steinbuch's action against Cutler, Hyperion Books, and Disney Publishing Worldwide for lack of personal jurisdiction and against Home Box Office and Time Warner for failure to state a claim. Steinbuch appealed, but his appeal of the dismissal of Cutler was stayed after she filed a bankruptcy petition in New York.[3] We affirm except as to Hyperion Books.

I.

Robert Steinbuch is currently a law professor at the University of Arkansas in Little Rock. Prior to assuming that position in the summer of 2005,[4] he worked in Washington, D.C. While serving as

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2 The Honorable William R. Wilson, Jr., United States District Judge for the Eastern District of Arkansas.

3 Steinbuch then filed a claim against Cutler in federal bankruptcy court for the Northern District of New York. His earlier action against Cutler in federal district court in Washington, D.C. has also been stayed.

4 Steinbuch claims in his brief that he has been a resident of Arkansas since June 1, 2005 and provided an employment offer letter from the university as supporting evidence; his complaint does not allege when he moved to Arkansas. The district court found that Steinbuch had not yet become a resident by the time the novel was published in June 2005.

counsel to then Senator Mike DeWine on the United States Senate Judiciary Committee, Steinbuch engaged in a sexual relationship with fellow staff member Jessica Cutler. Unbeknownst to him, Cutler was chronicling physical encounters with him and five other men in her internet weblog entitled *The Washingtonienne*. The weblog, a graphic online diary which achieved particular notoriety in Washington, D.C. when posted in May 2004, describes intimate details of Cutler's relationship with Steinbuch and her other lovers. Steinbuch was not identified by name in the weblog; he was generally referred to by his initials "RS" although Cutler at least once called him "Rob." She also revealed some personal information, including his place of employment, religious affiliation, and physical attributes. ("RS looks just like George Clooney when he takes off his glasses."). Steinbuch does not dispute that he had a brief liaison with Cutler but denies particular statements she made in her weblog about some of his alleged sexual preferences and practices, including spanking and use of handcuffs.

Approximately one year after her weblog posting, Cutler authored a fictionalized book based on its content. Like the weblog, her novel is entitled *The Washingtonienne* and describes a young woman's trysts with numerous men in Washington, D.C., including a Congressional committee staff lawyer. The novel concerns fictional characters and does not refer to Steinbuch by name or by his

initials. It was published in June 2005 by Hyperion Books (Hyperion), an imprint of Buena Vista Books Inc. (Buena Vista), which is a wholly owned subsidiary of Disney Publishing Worldwide (Disney). The novel was distributed throughout the United States by Time Warner Book Group, Inc., now Hachette Book Group, USA. Time Warner Book Group, Inc. was a subsidiary of Time Warner.

Steinbuch filed his complaint in the federal district court for the Eastern District of Arkansas, alleging invasion of privacy and intentional infliction of emotional distress -- the tort of outrage -- for the book's graphic description of his sexual relationship with Cutler. In addition to Cutler, he sued the publisher, its parent corporation Disney, as well as Home Box Office (HBO) and its parent Time Warner. HBO has secured an option to develop a television series based on the book.

None of the defendants reside, are incorporated, or have their principal place of business in Arkansas. Cutler, Hyperion, and Disney argued in the district court that they lacked the requisite minimum contacts with Arkansas and were therefore entitled to dismissal pursuant to Fed. R. Civ. Proc. 12(b)(2). Time Warner and HBO filed a Fed. R. Civ. Proc. 12(b)(6) motion for failure to state a claim upon which relief could be granted. In response to these motions, Steinbuch petitioned the district court for a three month extension to file a reply. Defendants asked the court to stay discovery

pending its ruling on their dismissal motions because they wanted to avoid potentially broad discovery requests and the risk of waiving their jurisdictional claims before their motions were ruled on. Steinbuch filed a motion opposing a stay of discovery; the motion made no explicit request to conduct limited discovery tailored to the specific issue of personal jurisdiction. The district court allowed Steinbuch an extension of about two months to file his reply, but granted the defense motion to stay discovery until ruling on the motions.

The district court noted that all the corporate defendants sold their products or services in Arkansas and analyzed whether it could exercise personal jurisdiction over them under either specific or general personal jurisdiction. It found that *The Washingtonienne* and other books published by Hyperion were being sold in Arkansas bookstores. There was no evidence that Hyperion had mounted a large advertising campaign, and the court observed that only about fifty copies had been sold to wholesale and retail accounts in Arkansas. The district court concluded that the exercise of personal jurisdiction over Hyperion would be unwarranted because its contacts with Arkansas were too attenuated and the injury to Steinbuch did not occur as a result of its activities directed at the forum state, especially since Steinbuch had moved to Arkansas only after publication of the novel.

The action against Disney was also dismissed

for lack of personal jurisdiction because it is a separate corporate entity from Hyperion and played no role in publishing the novel. Since Steinbuch had failed to rebut Disney's affidavits that it had no direct involvement in the novel's publication, the district court concluded that he had not made a prima facie case that Disney had engaged in conduct causing his injury or that it maintained the requisite contacts with Arkansas to be subject to personal jurisdiction.

In concluding that no personal jurisdiction could be exercised over defendants, the district court noted Arkansas' relatively small interest in the dispute since the claims did not arise in the state and the alleged injuries occurred prior to Steinbuch's move to Arkansas. The court also suggested that the District of Columbia, where the novel's events took place and where potential witnesses resided, would serve as a more appropriate forum.

The district court also granted the dismissal motions of HBO and its corporate parent Time Warner for failure to state a claim for relief under Arkansas law, concluding that the complaint offered no indication that they had invaded Steinbuch's privacy, committed outrage, or had breached a duty toward him.

On appeal Steinbuch asks us to reverse the district court's dismissal of his claims against Hyperion and Disney for lack of personal jurisdiction

and against HBO and Time Warner for failure to state a claim. He also appeals the district court's stay of discovery pending its ruling on the motions to dismiss.

II.

We review a dismissal for lack of personal jurisdiction de novo, and the party asserting jurisdiction bears the burden of establishing a prima facie case. Johnson v. Woodcock, 444 F.3d 953, 955 (8th Cir. 2006). To survive a motion to dismiss, the plaintiff must state sufficient facts in the complaint to support a reasonable inference that defendants may be subjected to jurisdiction in the forum state. Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072 (8th Cir. 2004). The Arkansas long arm statute confers jurisdiction to the fullest constitutional extent, limiting our inquiry to whether such an exercise of jurisdiction would comport with due process. Id. at 1073; see also Ark. Code Ann. § 16-4-101(B)(1999).

Due process requires "minimum contacts" between a nonresident defendant and the forum state, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). The minimum contact inquiry focuses on whether the defendant purposely availed itself of the privilege of conducting activities within the forum state and

thereby invoked the benefits and protections of its laws. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

The Supreme Court has recognized two theories for evaluating personal jurisdiction: general and specific jurisdiction. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984). A state may exercise general jurisdiction if a defendant has carried on in the forum state a continuous and systematic, even if limited, part of its general business; in such circumstances the alleged injury need not have any connection with the forum state. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984). The plaintiff must make a prima facie showing, however, that the defendant's contacts were not "random," "fortuitous," or "attenuated." Id. at 774. Specific jurisdiction on the other hand is appropriate only if the injury giving rise to the lawsuit occurred within or had some connection to the forum state, meaning that the defendant purposely directed its activities at the forum state and the claim arose out of or relates to those activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

To evaluate the sufficiency of a defendant's contacts, we consider five factors, affording the first three primary importance: 1) the nature and quality of the defendant's contacts with the forum state; 2) the quantity of such contacts; 3) the relation of the cause of action to the contacts; 4) the interests of the forum state in providing a forum for its residents;

and 5) the convenience of the parties. Burlington Industries, Inc. v. Maples Industries, Inc., 97 F.3d 1100, 1102 (8th Cir. 1996). The third factor -- the relation of the cause of action to the contacts -- applies only in the specific jurisdiction context and is immaterial in a general jurisdictional inquiry. See Johnson, 444 F.3d at 956.

A.

Hyperion contends that it maintained no contacts with Arkansas which would justify the exercise of either theory of personal jurisdiction and asserts that no specific jurisdiction is warranted because this litigation did not result from injuries arising out of or relating to Hyperion's activities in Arkansas. See Burlington Industries, Inc., 97 F.3d at 1103. Steinbuch responds that specific jurisdiction exists over Hyperion, suggesting that he suffered harm due to the publisher's activities directed at Arkansas which resulted in the purchase of Cutler's novel by state residents. To sustain his argument, Steinbuch would have to show that Hyperion knew that "the brunt of the injury would be felt by [him] in the State in which [he] lives and works" and intentionally targeted the forum state. See Calder v. Jones, 465 U.S. 783, 789-90 (1984). This is an unlikely proposition, since the publication of *The Washingtonienne* occurred around the same time as Steinbuch's move to Arkansas.

While Steinbuch claims that he became an

Arkansas resident just prior to the publication of the novel and produced an employment offer letter from the University of Arkansas to begin his position on June 1, 2005, he failed to assert in his first and amended complaints that he resided in Arkansas at the time and provided no affidavit to the district court declaring his date of residency in the state. Hyperion refuted Steinbuch's residency claim by pointing to his failure to allege this fact in his complaints. Steinbuch's cause of action appears to have no direct connection with the forum state or to have arisen out of or relate to Hyperion's activities in Arkansas. See Burger King Corp., 471 U.S. at 472. None of the events described in the novel took place in Arkansas, and Steinbuch has failed to show that Hyperion's contacts with Arkansas and the relationship between his cause of action and those contacts are sufficient to justify the exercise of specific jurisdiction. See Burlington Industries, Inc., 97 F.3d at 1102.

Hyperion asserts that no general jurisdiction exists because it did not conduct business in the forum state as defined by Arkansas statute in Ark. Code. Ann § 4-27-1501 (a foreign corporation may not transact business in Arkansas until it obtains a certificate of authority from the secretary of state). Hyperion also argues that it is not responsible for the distribution of its books and that it lacks formalized ties to Arkansas such as a bank account, a registered agent, a corporate office, or real estate. See, e.g., Dever, 380 F.3d at 1074 (noting absence of

these factors in finding a lack of general jurisdiction); but see Vandelune v. 4B Elevator Components Unlimited, 148 F.3d 943, 948 (8th Cir. 1998) (absence of these factors, while significant, is not determinative on question of market presence). Steinbuch counters that Hyperion purposely availed itself of the protections of the forum state laws by continuously and deliberately exploiting the Arkansas market. See Keeton, 465 U.S. at 781. In support of his argument, Steinbuch produced a list of approximately thirty different Hyperion book titles available in a particular Arkansas bookstore, affidavits by several individuals who purchased Cutler's novel in Arkansas, and an affidavit declaring that *The Washingtonienne* is available at all major bookstores in Arkansas, as well as through the state's central public library system.

In finding a lack of general jurisdiction, the district court emphasized the relatively small number of sales of *The Washingtonienne* in Arkansas and the lack of a substantial advertising campaign for the book in the state. In a general jurisdiction inquiry, however, we must look not to the sales of that particular novel but to Hyperion's general presence in Arkansas. See id. at 779-81 (nonresident magazine publisher subject to general personal jurisdiction for alleged defamation because it carried out part of its general business in the forum state and benefitted from the magazine sales there). The percentage of a company's sales in a given state is generally not relevant to the general

jurisdiction analysis as the focus lies on whether the contacts are continuous and systematic. See Lakin v. Prudential Securities, Inc., 348 F.3d 704, 709 (8th Cir. 2003). Since the affidavits by individuals who purchased *The Washingtonienne* in Arkansas imply that Hyperion has profited from the sale of its books in the state, the inquiry centers on whether the publisher's forum contacts are such that it purposely availed itself of the privilege of conducting business in the state and should therefore have reasonably anticipated being haled into court. See Johnson, 444 F.3d at 955.

While mere placement of a product into the stream of commerce, without more, is insufficient to constitute purposeful availment, Dever, 380 F.3d at 1075, we have recognized a state's exercise of jurisdiction over a seller who delivered its products to a regional distributor with an expectation that the distributor would penetrate the forum state. See Vandelune, 148 F.3d at 948. Seeking to demonstrate that it exercised no influence over the distribution of its books, Hyperion disclosed to the district court its agreement with distributor Time Warner Book Group, Inc. Although the agreement granted the distributor the exclusive right and sole responsibility for distribution of the books throughout the United States and did not explicitly target specific states or regions, it did provide for written monthly sales reports to the publisher. The fact that it contracted to receive monthly sales reports, especially if these reports were to display sales on a state by

state basis, would permit an inference that Hyperion had reasonable expectations and knowledge that its products were going to be offered in the Arkansas market. See Barone v. Rich Bros. Display Fireworks Co., 25 F.3d 610, 613 (8th Cir. 1994) (foreign fireworks producer's alleged lack of knowledge of distribution "defies reason and could aptly be labeled 'willful'"); but see Guiness Import Co. v. Mark VII Distributors, Inc., 153 F.3d 607, 615 (8th Cir. 1998) (foreign beer manufacturer whose title over the beer passed to importer in Jamaica and who exercised no control over selection of distributor in the United States not subject to jurisdiction in Minnesota).

There is also evidence, as a result of Hyperion's disclosure of the distribution agreement, that the publisher was actively involved in marketing plans and promotions of books placed in stores. Hyperion's distribution agreement provides that "Publisher will consult with Distributor with respect to establishing marketing plans, sales forecasting, determining appropriate print runs, and planning advertising and promotional campaigns for the Books, and Publisher will make and notify Distributor of final decisions." See Sondergard v. Miles Inc., 985 F.2d 1389, 1397 (8th Cir. 1993) (noting that cold medicine manufacturer did not limit where its products may be purchased and was therefore subject to general jurisdiction). It thus appears that Hyperion may have been involved in the promotion and marketing of its books and might have reasonably expected their distribution in

Arkansas.

Although carrying less weight than the nature, quality, and quantity of Hyperion's contacts with the forum, other relevant factors are the interest of the state in protecting its residents and the need to ensure that a suit in the forum would not offend defendant's due process rights. Dever, 380 F.3d at 1074. Although Steinbuch is a relatively new resident, Arkansas has an interest in protecting his privacy rights as it is the forum where he would appear to suffer the most direct effects of Hyperion's activities. Cf. Lakin, 348 F.3d at 713 (state has significant interest in giving insolvent insurance companies a forum to litigate). The burden of litigation to a corporate publisher such as Hyperion, which is incorporated in California and derives profits from the sale of its books across the country, would not appear to be so great as to require dismissal. See Burger King Corp., 471 U.S. at 473-74 (unfairness could arise if parties which purposefully derive benefit from interstate activities were allowed to escape from consequences arising from those activities).

Steinbuch claims that by granting a stay of discovery pending its rulings on the motions to dismiss his complaint, the district court wrongly deprived him of the opportunity to support his jurisdictional argument. We employ an abuse of discretion standard in reviewing a district court's denial of discovery. Lakin, 348 F.3d at 713. On the

basis of the current record which reflects that Steinbuch offered documentary evidence, and not merely speculations or conclusory allegations, about Hyperion's contacts with Arkansas, the district court should not have dismissed his action against Hyperion without permitting him to take some jurisdictional discovery to establish whether general personal jurisdiction would be justified. See Dever, 380 F.3d at 1074 n.1.

At this point, however, Steinbuch has not adduced sufficient proof for a prima facie case of general personal jurisdiction over Hyperion. He has not shown enough specifics about the quality and quantity of Hyperion's contacts with the state or the publisher's exploitation of the Arkansas market. We therefore remand Steinbuch's claim against Hyperion for an opportunity for tailored discovery to elicit whether its contacts with Arkansas were so continuous and systematic as to warrant general personal jurisdiction over the publisher.

B.

Appellee Disney asserts that it has no connection to Steinbuch's claim, refuting a basis for either theory of personal jurisdiction. Challenging Steinbuch's assertion that it should be responsible for his injuries inflicted by Buena Vista's Hyperion imprint, Disney argues that it did not contract with Cutler, did not publish the novel, and was not party

to the distribution agreement. Affidavits by Hyperion and Disney executives stated that while Disney is Buena Vista's parent, they are distinct corporate entities with separate bank accounts and books and records and Disney does not control the day to day affairs of Buena Vista. Disney maintained no registered agent, bank accounts, telephone listings, real estate, or offices in Arkansas at the time Steinbuch filed suit. Steinbuch contends, however, that Disney engages in continuous and systematic business activity in Arkansas, pointing to its cable television programs in the state and the registered agent for process Disney installed in September 2006.

Before a party may obtain personal jurisdiction over a parent company, the plaintiff must show that the parent dominates and controls the subsidiary; mere ownership of subsidiary is insufficient to justify personal jurisdiction. Epps v. Stewart Information Services Corp., 327 F.3d 642, 648-49 (8th Cir. 2003). Whether a subsidiary is subject to personal jurisdiction in the state has no effect on the jurisdictional inquiry regarding its parent. Id. at 649 ("A corporation is not doing business in a state merely by the presence of its wholly owned subsidiary.").

Steinbuch failed to meet his burden of proving jurisdiction by providing any affidavits, testimony, or documents in response to Disney's affidavit denying control over Hyperion and challenging

personal jurisdiction. See Dever, 380 F.3d at 1073. Steinbuch merely submitted various newspaper articles which referred to Hyperion/Disney as publisher of *The Washingtonienne*. The articles did not establish that Disney controls Hyperion and therefore did nothing to refute Disney's affidavit. Steinbuch additionally pointed to the distribution agreement governing the sales and marketing of the book as a basis for personal jurisdiction, citing to it as evidence that Disney published the novel under the Hyperion imprint, since the agreement includes a footnote on the bottom of each page that reads "CFR/Disney Agreement.12.04.03(v5)." Even a cursory look at the distribution agreement, however, shows that it was entered into by the distributor Time Warner Book Group, Inc. and three publishers, not including Disney Publishing Worldwide. The plain language of the agreement excludes "books published by Publisher's parent company, The Walt Disney Company, and companies which are owned or controlled by The Walt Disney Company (other than Publisher)." The distribution agreement thus cannot serve to establish personal jurisdiction over Disney.

By not furnishing factual evidence in response to Disney's denial of continuous and systematic contacts in the state, Steinbuch fell short of establishing a prima facie case of general jurisdiction. Whether some arm of The Walt Disney Company media empire offers television programming in Arkansas does not determine the propriety of personal jurisdiction over appellee

Disney Publishing Worldwide. The appointment of an agent for service of process in Arkansas occurred more than one year after the publication of *The Washingtonienne* and after Disney's motion to dismiss, and is but one factor in undertaking the minimum contacts inquiry; it is insufficient by itself to prove a prima facie case. See Pecoraro v. Sky Ranch For Boys, Inc., 340 F.3d 558, 562 (8th Cir. 2003) ("Minimum contacts must exist either at time the cause of action arose, the time the suit is filed, or within a reasonable period of time immediately prior to the filing of the lawsuit.").

In light of Steinbuch's failure to show that Disney had a connection with the dispute, we see no justification for the exercise of specific jurisdiction. See Calder, 465 U.S. at 788 (specific jurisdiction inquiry focuses on "the relationship among the defendant, the forum, and the litigation"). Since Steinbuch offered no credible evidence that Disney had any involvement in the publication or distribution of the novel and instead made merely conclusory allegations about Disney's alleged role, the district court did not err in dismissing his claims for lack of personal jurisdiction.

Finally, the district court did not abuse its discretion by granting a stay of discovery against Disney because Steinbuch failed to rebut its affidavits denying corporate control over Hyperion and offered only speculative and conclusory assertions about Disney's contacts with the forum

state. See Dever, 380 F.3d at 1074.

C.

We next address Steinbuch's allegation that he was harmed by HBO's acquisition of an option to produce a fictional television series based on *The Washingtonienne*. The district court granted the motion by HBO and Time Warner for dismissal under Fed. R. Civ. Proc. 12(b)(6) because it concluded that Steinbuch had failed properly to plead causes of action in his complaint for invasion of privacy and outrage.

Applying de novo review to the district court's ruling, we assume as true all allegations in the complaint which must contain sufficient facts, as opposed to mere conclusions, in support of the legal requirements of the claim to avoid dismissal. DuBois v. Ford Motor Credit Co., 276 F.3d 1019, 1022 (8th Cir. 2002). An invasion of privacy claim in Arkansas incorporates the theories of (1) misappropriating the plaintiff's name or likeness for the defendant's commercial benefit; (2) intrusion upon seclusion; (3) public disclosure of private facts; and (4) false light in the public eye. Milam v. Bank of Cabot, 327 Ark. 256, 937 S.W. 653, 657 (1997). To establish a claim of outrage, a plaintiff must demonstrate that (1) the defendant intended to inflict emotional distress or knew or should have known that the emotional distress would be the likely result of the conduct; (2) the conduct was extreme and outrageous beyond all

possible bounds of decency and intolerable in a civilized community; (3) the actions of the defendant were the cause of plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. Calvary Christian School, Inc. v. Huffstuttler, 367 Ark. 117, 238 S.W.3d 58, 68 (2006). HBO concedes that it has acquired an option to develop a television series based on Cutler's novel but asserts that it has not published anything whatsoever about Steinbuch and thus has not invaded his privacy or caused outrage. See Calvary Christian, 238 S.W.3d at 68 (dismissing claim of outrage since the conduct has not yet occurred); Restatement 2d Torts § 652A-E (invasion of privacy implies publicity of private facts of another). Steinbuch's complaint is devoid of any factual support for his allegation that he has been injured by the yet undeveloped television series.

Steinbuch merely speculates that HBO might injure his privacy rights at some time in the future, and its parent corporation Time Warner is not even mentioned in the body of the complaint. See Levy v. Ohl, 477 F.3d 988, 991 (8th Cir. 2007) (complaint must allege sufficient facts to avoid dismissal). In light of the complaint's failure to allege a colorable claim against HBO and Time Warner, there would be no basis for injunctive relief against the mere possibility of a future television series based on

Cutler's novel[5] or against Time Warner for its alleged role as the distributor of *The Washingtonienne,* an allegation which is nowhere to be found in the complaint. We also find no abuse of discretion in the district court's refusal to allow discovery against Time Warner and HBO because Steinbuch's complaint lacked sufficient allegations to state a claim.

III.

Accordingly, we affirm the judgment of the district court dismissing Disney World Publishing, Time Warner, and Home Box Office. We reverse the final judgment entered in favor of Hyperion Books, and remand for further proceedings not inconsistent with this opinion and for discovery on the issue of whether general personal jurisdiction exists over Hyperion.

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5. We therefore need not discuss any potential First Amendment issues in respect to an injunction pertaining to these parties. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights).

EXHIBIT B: ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 07-1509

Robert Steinbuch,
Appellant

v.

Jessica Cutler, et al.,
Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:06-cv-00620-WRW)

ORDER

The petition for rehearing by the panel filed by appellant is denied.

April 10, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

EXHIBIT C: DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ROBERT STEINBUCH PLAINTIFF
VS.
JESSICA CUTLER; HYPERION BOOKS; DISNEY PUBLISHING WORLDWIDE; HOME BOX OFFICE; AND TIME WARNER DEFENDANTS

4:06CV00620-WRW

ORDER

Pending are Motions to Dismiss for Lack of Personal Jurisdiction filed by Defendants Jessica Cutler ("Cutler"),[1] Disney Publishing Worldwide ("Disney"),[2] and Hyperion Books ("Hyperion").[3] Also pending are Motions to Dismiss for failure to state a cause of action and for lack of personal jurisdiction filed by Defendants Home Box Office (HBO) and Time Warner("Warner").[4] Warner also alleges that the complaint should be dismissed because it is not liable for the actions of

1. Doc. No. 28.

2. Doc. No. 38.

3. Doc. No. 40.

4. Doc. No. 44.

HBO. Plaintiff, Robert Steinbuch ("Steinbuch"), responded to all Motions.[5] Cutler[6] and Hyperion[7] filed Replies to Steinbuch's Response. Steinbuch filed a Motion to Strike the Replies.[8]

I. Background

This action began when Hyperion published a book entitled *The Washingtonienne* written by Cutler. Steinbuch sued for invasion of privacy and intentional infliction of emotional distress because the book describes, in graphic detail, a sexual relationship between Steinbuch and Cutler. As part of his invasion of privacy claim, Steinbuch alleges that Defendants misappropriated his likeness, placed him in a false light, and intruded on his seclusion.[9]

Cutler and Hyperion contend that there is no basis for personal jurisdiction.

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5. Doc. No. 55.

6. Doc. No. 60.

7. Doc. No. 59.

8. Doc. No. 61.

9. Doc. No. 4.

Hyperion is an imprint[10] of Buena Vista Books, Inc., which is a subsidiary of Defendant Disney. While Disney may be the parent of Buena Vista Books, it alleges that it is a separate and distinct corporation that cannot be held liable for the conduct of its subsidiary. Disney asserts that it does not have sufficient contacts with Arkansas to establish jurisdiction.

Warner is the parent company of HBO. According to HBO and Warner, Steinbuch's complaint makes few factual allegations about either company, and fails to make sufficient allegations to establish personal jurisdiction. HBO and Warner contend that Steinbuch fails to allege facts that are essential to the tort claims of invasion of privacy and intentional infliction of emotional distress.

In response to the motions, Steinbuch argues that Cutler, Hyperion, and Disney agreed to distribute *The Washingtonienne* in every state, including Arkansas. He also asserts that the book is readily available in Arkansas and attaches five affidavits from Arkansans who purchased the book.[11] Steinbuch argues that Arkansans also can buy the book from Cutler's on-line sex-shop, where she has sold her products to at least

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10. An imprint is a brand name under which a work is published. One single publishing company may have multiple imprints. Source: *Wikipedia* at http://en.wikipedia.org/wiki/Imprint.

11. Doc. No. 55, App. 2, Exs. 4-9.

three Arkansas residents.[12] He also produces evidence that Cutler, via the internet, sold an autographed copy of her book in Arkansas.[13] With respect to HBO and Time Warner, Steinbuch offers documents that demonstrate extensive business activity in Arkansas by both these corporations.

II. Authority

A. Standard for Motion to Dismiss

To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must state sufficient facts in the complaint to support a reasonable inference that the defendants are subject to jurisdiction.[14] When jurisdiction is denied, the burden shifts to the plaintiff to allege enough facts to establish jurisdiction.[15] The plaintiff's *prima facie* showing of jurisdiction must be supported by the pleadings, and also by the affidavits presented with the pleadings.[16] When a defendant

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12. Doc. No. 55, App. 2, Exs. 6, 14, and 15.

13. Doc. No. 55, App. 5, Ex. 16.

14. *Block Indus. v. DHJ Indus., Inc.*, 495 F.2d 256, 259 (8th Cir. 1974).

15. *Id.*

16. *Id.* at 260; *see also Davis v. St. John's Health Sys., Inc.*, 348 Ark. 17 (2002) (holding that if the complaint does not allege sufficient facts on which personal jurisdiction can rest, then the

attaches affidavits that raise a meritorious challenge to personal jurisdiction, the plaintiff is required to prove jurisdiction by affidavits, testimony or documents.[17]

B. Personal Jurisdiction

In a diversity action, a federal court may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state, and by the due process clause of the Fourteenth Amendment.[18] In 1995, the Arkansas General Assembly amended the long-arm statute to authorize jurisdiction over foreign corporations to the fullest extent allowed by constitutional due process.[19]

Due process requires "minimum contacts" between the nonresident defendant and the forum state such that "maintenance of the suit does not offend traditional notions of fair play and substantial

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complaint is factually deficient, and mere conclusory statements do not suffice).

17. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1074 (8th Cir. 2004) (citing *Jet Charter Serv., Inc. v. W. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990)).

18. *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir. 1994).

19. Ark. Code Ann. § 16-4-101(B) (1999); *see also Mountaire Feeds, Inc. v. Agro Impex*,S.A., 677 F.2d 651, 653 (8th Cir. 1982).

justice."[20] Under due process, a nonresident defendant's contacts with a forum state must be sufficient to cause the defendant to "reasonably anticipate being haled into court there."[21] The Supreme Court has identified two types of personal jurisdiction -- general and specific.

When a cause of action arises out of or is related to a defendant's contacts with the forum state, the exercise of personal jurisdiction is one of specific jurisdiction.[22] However, if the exercise of jurisdiction arises in a case that does not stem from the defendant's contacts, the exercise of personal jurisdiction is one of general jurisdiction.[23]

Where specific personal jurisdiction over a nonresident is asserted, due process is satisfied if the defendant purposely directed its activities at forum residents, and the litigation results from injuries

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20. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

21. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

22. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

23. *Id.*; *see also Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *Wessels, Arnold & Henderson v. National Medical Waste, Inc.*, 65 F.3d 1427, 1432 n.4 (8th Cir. 1995).

related to those activities.[24] When general jurisdiction is in question, a defendant may be subject to the state's exercise of personal jurisdiction if contacts with the state are continuous, systematic, and substantial.[25]

To determine if there are sufficient contacts establishing general jurisdiction, the Eighth Circuit has outlined five crucial factors: (1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties.[26] The first three factors are of primary importance.[27]

Jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly owned subsidiary.[28] Each defendant's contacts with the

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24. *Burger King Corp.*, 471 U.S. at 472.

25. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

26. *Burlington Industries, Inc. v. Maples Industries, Inc.*, 97 F.3d 1100, 1102 (8th Cir. 1996).

27. *Id.*

28. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (citing *Consol. Textile Co. v. Gregory*, 289 U.S. 85, 88 (1933)).

forum state must be assessed individually.[29]

C. Personal Jurisdiction and Stream of Commerce Theory

A state "does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state and those products subsequently injure forum consumers."[30] Moreover, where individuals purposefully derive benefits from interstate activities, they should be held accountable for the consequences of those activities.[31] However, the application of the "purposeful availment" rule will vary with the nature and quality of the contacts made by a defendant. For instance, a defendant will not be haled into another jurisdiction because of "random," "fortuitous," or "attenuated"

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29. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

30. *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98.

31. *Burger King* Corp., 471 U.S. at 472; *see also Keeton*, 465 U.S. at 771; *Calder v. Jones*, 465 U.S. 783 (1984) (holding that an outside publisher that distributes magazines or newspaper in a state may be held accountable for damages caused by an allegedly defamatory story).

contacts,[32] or because of the "unilateral activity" of another party.[33] The contacts must be such that the forum state represents a focal point of both the conduct and the harm.[34]

D. Liability for Intentional Conduct

Under Arkansas law, negligence requires that the plaintiff show a duty was owed and that the duty was *breached.*[35] As with a negligence claim, an intentional or bad faith claim must still comply with the fundamental notions of duty and breach before there is liability.[36] Intentional torts, such as invasion of privacy and the intentional infliction of emotional distress, require that a defendant engage in a culpable act.[37] A

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32. *Keeton*, 465 U.S. at 774; *World-Wide Volkswagen Corp.* 444 U.S. at 299.

33. *Helicopteros*, 466 U.S. at 417.

34. *Calder*, 465 U.S. at 789.

35. *Quinn v. Ocwen Federal Bank FSB*, 470 F.3d 1240, 1245 (8th Cir. 2006) (quoting *Young v. Paxton*, 316 Ark. 655, 660 (1994) (emphasis added).

36. *Stanton v. State Farm Fire and Cas. Co., Inc.*, 169 F. Supp. 2d 1109 (D. S.D. 2001).

37. *Lewis v. Swenson*, 617 P.2d 69 (Ariz. App. 1980) citing Restatement (Second) Torts §§ 870, 871 and 871A (1977)).

culpable act must be affirmative not passive.[38]

E. Invasion of Privacy and the Single Publication Rule

Arkansas recognizes the intentional tort of invasion of privacy.[39] The Arkansas Supreme Court adopted the standard set out in the Restatement (Second) of Torts, which creates four separate torts classified as an invasion of privacy: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public.[40]

With the expansion of privacy law, a "false light" invasion of privacy action will often arise from the same circumstances which give rise to a cause of action for defamation. The similarities between the two causes of action are recognized by federal courts which have often carried over elements of state defamation law into their

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38. *Barnes v. Danner*, 216 P.2d 804, 807 (D. Kan. 1950); *Paur v. Rose City Dodge, Inc.*,438 P.2d 994 (Or. 1968).

39. *Olan Mills, Inc. v. Dodd*, 234 Ark. 495 (1962).

40. *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628 (1979); *see also Flectcher v. Price Chopper Foods of Truman, Inc.*, 220 F.3d 871 (8th Cir. 2000) (applying Arkansas' standards for the tort of invasion of privacy).

consideration of false-light invasion actions.[41] The Supreme Court has analyzed "false light" invasion of privacy claims against publications under the same standards applied to defamation claims.[42] Based on the similarities between these two causes of actions -- the Single Publication Rule for defamation claims is applied to invasion of privacy claims.[43] This rule allows one action for damages connected to any single publication, and an award for damages sustained in all jurisdictions to be recovered in one action. It also bars any other action for damages between the same parties after a judgment is entered.[44]

The Uniform Single Publication Act has been adopted by several states, including Arizona, California, Idaho, Illinois, New Mexico, Pennsylvania, and North Dakota.[45] This act extended the Single Publication Rule

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41. *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1088 (E.D. Pa. 1980); *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 766 (D.N.J. 1981); *Braun v. Flynt*, 726 F.2d 245, 250 (1984).

42. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

43. 41 A. L. R. 4th 541 §§ 3, 5, 7(b) (1985).

44. Restatement (Second) Torts § 577A (1977).

45. Ariz. Rev. Stat. Ann. § 12-651 (1982)); Cal. Civ. Code §§ 3425.1 to 3425.5 (Deering 1984); Idaho Code §§ 7-702 to 7-705 (1979); Ill. Ann. Stat. ch. 126, paras. 11-15 (Smith-Hurd 1987); N. M. Stat. Ann. §§ 41-7-1 to 41-7-5 (1986); N.D. Cent. Code 14-02-10 (1987); 42 Pa. Cons. Stat. Ann. § 8341

to invasion of privacy claims. New York judicially adopted the Single Publication Rule and extended it to cover invasion of privacy.[46] Arkansas has not adopted the Uniform Act nor has the Arkansas Supreme Court recognized the Single Publication Rule. In contrast, the District of Columbia recognizes the rule.[47]

III. Discussion

A. General and Specific Jurisdiction

If Steinbuch's claim of invasion of privacy arose out of or is related to the publication and distribution of *The Washingtonienne*, then the exercise of personal jurisdiction is one of specific jurisdiction.[48] Where specific jurisdiction of a nonresident is asserted, there must be a direct link between the defendant's contacts

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Notes (West Supp. 1994).

46. *Khaury v. Playboy Publications, Inc.*, 430 F. Supp. 1342 (D.C. N.Y. 1977) (*citing Gregoire v. G.P. Putnam's Sons*, 81 N.E. 2d 152 (N.Y. 1953)).

47. *Ogden v. Association of United States Army*, 177 F. Supp. 498 (D.C. Dist. 1959).

48. *Burger King Corp.*, 471 U.S. at 473, n.15.

with the forum state and the harm.[49]

Steinbuch is an Arkansas resident. Hyperion, Disney, HBO, and Warner sell their products or services in this state. Cutler personally solicited business in this state via the internet, and she signed a contract agreeing to distribute her book throughout the United States, including Arkansas.

The alleged harm in this case arose from an invasion of Steinbuch's privacy. This alleged invasion of privacy took place when Cutler wrote and Hyperion published a book about behavior that took place outside Arkansas. Cutler signed the publication agreement in July 2004,[50] and the book was published in June 2005.[51] Steinbuch became a resident of Arkansas some time after the book was published.[52]

By the time Steinbuch reached this state, the

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49. *William v. Lakeview Co.*, 13 P.3d 280, 286 (Ariz. 2000), *Precept Medical Products, Inc.*, 282 F. Supp. 2d 381 (W.D. N.C. 2003); *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp 1383 (E.D. Tex. 1989).

50. Doc. No. 28, Ex. C.

51. Doc. No. 1, ¶ 17.

52. Doc. No. 55.

alleged invasion of privacy was complete.[53] Thus, the injury to Steinbuch did not occur as a result of Defendants' activities in this state, nor was it the result of activity directed at Arkansas residents. Because of this, Arkansas cannot assert specific personal jurisdiction. This case should, therefore, be analyzed according to the requirements for general jurisdiction and minimum contacts.

To determine if there are sufficient minimum contacts to establish general jurisdiction, I must consider the above mentioned five factors outlined by the Eighth Circuit.[54] The first three factors focusing on a defendant's contacts with the state are of primary importance to jurisdiction. The interest of Arkansas and convenience of the parties are a secondary concern.[55] Jurisdiction can be asserted if Steinbuch can make a *prima facie* showing that the Defendants systematically availed themselves of Arkansas' benefits and that their contacts with this state were not "random," "fortuitous,"

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53. Restatement (Second) Torts § 652H (1977) (explaining that one who has established a cause of action for invasion of his privacy is entitled to recover damages for the harm to his interest in privacy resulting from the invasion).

54. *Burlington Industries, Inc.*, 97 F.3d at 1102 (8th Cir. 1996).

55. *Id.*

or "attenuated."[56]

B. Minimum Contacts

1. The Quality, Quantity, and Nature of Contacts

The nature, quality, and quantity of the contacts of each Defendant must be considered separately, and the relationship of each Defendant's contacts to Steinbuch's invasion of privacy claim must also be evaluated one by one.[57] The nature and quality of the contacts depend on an analysis of Defendants' activity in Arkansas and whether their activities here represent a focal point of both the invasion of privacy claim and its resulting harm.[58]

Two Supreme Court opinions analyzed the question of general personal jurisdiction when confronted with facts similar to these facts -- *Calder v. Jones*[59] and *Keeton v. Hustler Magazine*.[60] The *Calder* case involved

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56. *Keeton*, 465 U.S. at 774; *World-Wide Volkswagen Corp.*, 444 U.S. at 299.

57. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (holding that each defendant's contacts with the forum state must be assessed individually).

58. *Calder*, 465 U.S. at 789.

59. *Id.*

60. *Keeton*, 465 U.S. at 770.

a California defamation action against a nonresident writer and an editor of the National Enquirer. *Keeton* involved a New Hampshire defamation action that was brought by a nonresident plaintiff against nonresident publishers of Hustler Magazine.

In *Calder*, the Supreme Court found that the plaintiff's activities in California were the focus of the defendant's alleged libelous story;[61] and, in *Keeton*, the Court found that the defendant's activities of distributing thousands of its magazines containing allegedly libelous material caused the plaintiff substantial harm in New Hampshire.[62] Defendants' contacts should be measured by using these two decisions as a guide.

The facts of this case contrast with the facts in *Calder*, where the subject-matter of the newspaper article was based on information from sources in California and concerned the activities of a California resident. Cutler has never set foot in Arkansas and her

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61. *Calder*, 465 U.S. at 789 (findings that defendants' conduct was expressly aimed at California, because they wrote and edited an article that they knew would have a devastating impact on the plaintiff in her home state and they knew that the brunt of the injury would be felt there).

62. *Keeton*, 465 U.S. at 771 and 774 (holding that where a magazine sells thousands of magazines on a regular monthly basis, the harm is purposely directed at New Hampshire and there is no unfairness in calling a defendant to answer for the contents of its national publication where a substantial number of copies are regularly sold and distributed).

book is based on her experiences in Washington, D.C.[63]

In *Calder*, the Supreme Court noted that the National Enquirer has its largest distribution in California;[64] and, in *Keeton*, the Court pointed out that Hustler sold thousands of copies of its magazine in New Hampshire.[65] In both cases, the Court focused not only on the quantity of the contacts, but also on the harm connected to the wide ranging dissemination of the alleged false information.

In this case, Cutler's book has had limited distribution in Arkansas, and Arkansans are not as likely as the residents of Washington D.C. to connect the fictionalized character in Cutler's book with Steinbuch. It is true that Cutler sold a limited number of items (including an autographed copy of *The Washingtonienne*) from her internet sex-store to Arkansans, but these actions do not come close to the quality and quantity of the contacts shown in *Calder* and *Keeton*. While Cutler was aware that her book would be distributed nationwide, her contacts with this state are secondary to her overall business activities.

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63. Doc. No. 28, Ex. 1.

64. *Calder*, 465 U.S. at 785, n.2.

65. *Keeton*, 465 at 772.

So, the nature and quality of her Arkansas contacts are attenuated, and the quantity of these contacts are minimal.

Hyperion books are sold in this state, and Cutler's book, *The Washingtonienne*, appeared in Arkansas bookstores. There is no indication that Hyperion mounted a large advertising campaign for *The Washingtonienne* in Arkansas, or hired an agent to distribute the book here.[66] What the evidence shows is that at least four copies of the book have been purchased here,[67] forty-six copies were sold to retail or wholesale accounts,[68] and two books were purchased from the internet. Like Cutler, the nature, quality, and quantity of Hyperion's contacts with this state are attenuated. Arkansas has not proved to be a lucrative market for Cutler's book, and the evidence shows that the book's minimal distribution is diminishing.

Disney produced an affidavit from its senior vice president stating that Disney is the parent of Buena Vista Books and does not control the business

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66. *Asahi Metal Insudstry Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (holding that advertising, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state may indicate an intent to serve the forum state's market).

67. Doc. No. 55, Exs. 4-8.

68. Doc. No. 40, Ex. 2.

operations and affairs of Buena Vista Books. The affidavit further states that Disney did not publish *The Washingtonienne*, did not enter into a contract with Cutler, has never paid Cutler, and had nothing to do with the distribution of the book.[69] Jurisdiction over Disney does not automatically follow because of the actions of its wholly owned subsidiary.[70]

To rebut this affidavit, Steinbuch offers several newspaper articles from the Cleveland Plain Dealer, The Hartford Courant, the New York Post-Standard, the New York Times, and other news sources that connect Disney with the publication of Cutler's book.[71] Newspaper articles are not generally admissible evidence, and are not sufficient to overcome sworn testimony from a witness who has personal knowledge of the facts.[72] Once Disney attached the affidavit to its motion, Steinbuch was obliged to offer evidence of jurisdiction, in addition to the allegations contained in

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69. Doc. No. 38, Ex. A.

70. *Keeton*, 465 U.S. at 781 n.13.

71. Doc. No. 55, Ex. 1.

72. *Pallotta v. United States*, 404 F.2d 1035 (1st Cir. 1968) (holding that newspaper articles are inadmissible hearsay); *see also* 55 A. L. R. 3d 663 (1974) (general discussion of cases that have found newspapers inadmissible as evidence of the truth of the facts stated in the article).

his complaint.[73]

Placement of products in the stream of commerce, without more, is insufficient to establish minimum contacts for the exercise of personal jurisdiction.[74] Even though Disney has an agent for service of process,[75] Steinbuch has failed to show that it regularly employs workers in Arkansas, owns and leases property here, or otherwise systematically avails itself of the privilege of conducting business in Arkansas.[76] Moreover, there is no evidence connecting Disney to the publication and distribution of Cutler's book in Arkansas. Steinbuch has failed to make a *prima facie* showing that Disney had continuous and systematic contacts with Arkansas to establish general personal jurisdiction, or that it engaged in conduct that caused an injury in this state.

Steinbuch also named HBO and Time Warner as a parties, alleging that HBO acquired the rights to make a television series based on *The Washingtonienne*. Time Warner is the parent company of HBO. HBO admits that it acquired the rights to Cutler's book for a possible

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73. *Dever*, 380 F.3d at 1073.

74. *Dever*, 380 F.3d at 1075.

75. Doc. No. 55, Ex. 8.

76. *Dever*, 380 F.3d at 1074.

future project, but, HBO has not yet created this television series.

Under fundamental tort principles, in order for HBO to be liable, it must have affirmatively breached a duty it owed to Steinbuch. There are no allegations in the Amended Complaint that HBO or Time Warner engaged in culpable acts that violated Steinbuch's privacy.[77] Since neither HBO nor Time Warner have published facts about Steinbuch, much less private facts about him, he has failed to allege an action of invasion of privacy against these two Defendants.

Even though Steinbuch offered evidence of extensive business conducted in this state by HBO and Time Warner, there is no evidence of wrongdoing by these corporations. So, despite their contacts with this state, their Arkansas business activity has not caused harm to an Arkansas resident such that an exercise of jurisdiction would be necessary for the protection of Arkansas citizens.

2. The Connection between the Contacts and the Harm

Since Steinbuch's Amended Complaint fails to sufficiently allege facts that Disney's, HBO's, and Time Warner's activities harmed him -- there is no connection

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77. *Barnes*, 216 P.2d at 807.

between their business activities in Arkansas and the invasion of privacy claim. Even though Cutler and Hyperion allegedly published private information about Steinbuch, their contacts are not substantially connected to Steinbuch's claim.

As stated above, the character in Cutler's book is a fictionalized character that is described in the book as a Washington attorney who works at the Capitol. So, it is not likely that Arkansas citizens will make the connection between the book's character and Steinbuch.

Cutler directly sold one book to an Arkansas resident -- the rest of her business activity in this state involved selling other products from her internet sex store. Hyperion sells its books in Arkansas, but has not targeted this state as a major market for Cutler's Washington-based sexscandal book.

C. Arkansas' Interest and Convenience of the Forum

The remaining factors to be considered are Arkansas' interest in taking jurisdiction of this claim and the convenience of the parties. While the Eighth Circuit has indicated that these two considerations are of less importance -- they can tip the scales, especially if jurisdiction is a close question.

Steinbuch is a resident of this state, but his claim arose before his arrival. Moreover, invasion of privacy claims create harm that is aimed at an individual plaintiff. In other words, unlike libel, Arkansas

residents are not being deceived by Cutler's book. So, this case is distinguishable from the *Keeton* case, where the Supreme Court found that New Hampshire had a clear interest in protecting its citizens from alleged falsehoods.[78]

There is no doubt that Arkansas has an interest in protecting its citizens from foreign residents or corporations who come into the state and injure one of its citizens. However, the alleged injurious conduct took place in another state, and the harm to Steinbuch's privacy was inflicted before he came here.

Finally, Steinbuch filed an action against Cutler for invasion of privacy in the District of Columbia before he moved to Arkansas.[79] The subject of this lawsuit is Cutler's publication of an internet "blog"[80] which inspired her book. The application of the Single Publication Rule would likely make the District of Columbia the best forum for this case. In *Keeton*, the Supreme Court found that the Single Publication Rule

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78. *Keeton*, 465 U.S. at 777.

79. Doc. No. 28, Ex. B.

80. Blog is a name for weblog and it means to write entries on a computer. Source: *The American Dictionary of the English Language* (4th ed. Houghton Mifflin Company 2000) at http:///www.dictionary.com.

was an important factor in New Hampshire's assumption of jurisdiction."

The District of Columbia recognizes the Single Publication Rule and is, therefore, more likely to consider the effects of Cutler's conduct throughout this country, and not just in Arkansas. On the other hand, Arkansas has not considered or developed this rule. Therefore, the District of Columbia is able to provide a more far-reaching remedy to Steinbuch by protecting his privacy interest in every state, including Arkansas.

The District of Columbia will provide a more convenient forum for this case. The events that inspired the book took place in Washington, D.C., and most of the alleged harm occurred there. Most of the witnesses to Steinbuch's claim are located on the East Coast, and the District of Columbia courthouse will be more convenient. The District of Columbia is also convenient for Steinbuch -- his attorney is from New Jersey and Steinbuch must appear there in order to continue his pending claim based on the contents of Cutler's internet "blog."

IV. Conclusion

Steinbuch is a resident of Arkansas, and he has

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81. *Keeton*, 465 U.S. at 773-75 (holding that the Single Publication Rule adopted by New Hampshire afforded it the opportunity to provide a nationwide remedy to the Plaintiff, and in light of this, New Hampshire had a greater interest in hearing the case).

shown that Cutler and Hyperion have conducted business in this state, including the sale of a limited number of copies of *The Washingtonienne* -- the book that allegedly invades Steinbuch's privacy. However, the contacts with Arkansas are not substantial, continuous, and systematic. When all the circumstances are reviewed, the scales tip against the assumption of personal general jurisdiction of these two Defendants.

For all of the reasons stated above, the Motions to Dismiss filed by Culter, Hyperion, Disney, HBO, and Time Warner are GRANTED and the Complaint is DISMISSED. The Motion to Strike filed by Steinbuch is DENIED.

IT IS SO ORDERED this 7th day of February, 2007.

/s/Wm. R. Wilson, Jr.
UNITED STATES DISTRICT JUDGE

EXHIBIT D: FIRST AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Robert Steinbuch Plaintiff,	:
-v-	:
Jessica Cutler & Hyperion Books & Disney Publishing Worldwide & Home Box Office & Time Warner Defendants.	:

Index No.: 4-06 CV0000 620GH

FIRST AMENDED COMPLAINT

I. Introductory Statement

1. This civil action is for invasion of privacy and infliction of emotional distress caused by the publishing of a book by the Defendants, and the serialization of that book, describing in graphic detail the intimate amorous and sexual relationship between Cutler and the Plaintiff, misappropriating PlaintiffÆs likeness, putting Plaintiff in false light, and intruding on Plaintiff's seclusion. Defendant's outrageous actions, constituted a gross invasion of his privacy and an intentional infliction of emotional distress, subjecting him to humiliation and anguish

beyond that which any reasonable person should be expected to bear.

II. The Citizenship of the Parties

2. The Plaintiff is a resident of Arkansas.

3. Defendants are residents of New York.

III. Jury Trial

4. Plaintiff demands a jury trial.

IV. Jurisdiction and Venue

5. Jurisdiction is founded on diversity of citizenship and amount in controversy.

6. Plaintiff is a citizen of Arkansas.

7. Defendants are citizens of New York.

8. The matter in controversy exceeds, exclusive of interests and costs, the sum of $75,000.

9. Venue is proper in this Court because the harm giving rise to the claims and the residence of the Plaintiff are in Arkansas.

V. Factual Allegations

10. For approximately two years until on or about

June, 2004, Plaintiff was a Counsel for the United States Judiciary Committee.

11. From approximately February through May of 2004, Defendant Cutler was an employee of the United States Senate.

12. In May 2004, Cutler published a ôblog,ö an Internet site, on which she added periodic entries from her Senate computer. She entitled the blog "Washingtonienne." Cutler's X-rated blog described in graphic detail her ongoing sexual relationships with six men, including Plaintiff. Cutler's "Washintonienne" blog became notorious and widely publicized throughout the world.

13. Cutler said: "With a blog, you can't expect your private life to be private anymore."

14. At the time of his relationship with Cutler, Plaintiff did not know that Cutler was simultaneously engaged in sexual relationships with another man, let alone with five other men, and let alone that she was prostituting herself to some of them; and Plaintiff did not know that Cutler was recording the details of her relationship with Plaintiff on a public blog. Defendant Cutler put Plaintiff's name and other identifying information about Plaintiff in her blog, and Defendant Cutler described Plaintiff as, among other things, a committee counsel who likes spanking. That blog is the subject of a separate and distinct

litigation.

15. Cutler said: "Some people with blogs are never going to get famous, and they've been doing it for, like, over a year. I feel bad for them."

16. Cutler signed a deal with Playboy Magazine which included a nude photo spread of Cutler posted on Playboy's Internet site, capitalizing on the publicity generated by her blog and her relationship with Plaintiff.

17. Cutler signed a book contract, receiving a $300,000 advance, with Hyperion Press, a division of the Disney Publishing Worldwide, to write a thinly disguised novel, of the roman a clef genre, in which the details of her relationship with Plaintiff are described in graphic fashion. On or about June 15, 2005, Defendants Cutler, Hyperion and Disney published a book with the same title as the blog, ôWashingtonienne,ö based upon Plaintiff's private real life events, which invaded Plaintiff's privacy. In addition, Defendants also placed Plaintiff in a false light.

18. According to Defendant Hyperion, the publisher of the book, the book is an "utterly unrepentant roman a clef exposing the scandalous truth. . . . [Cutler] uses her 'real life experience. . . for a sexy, semi-autographical novel that is sure to initiate a . . . game of Who's Who.'" Hyperion specifically advertised the

book as being in "a witty, unapologetic voice, the novel's narrator Jackie tells the story of . . . the staff counsel whose taste for spanking she 'accidentally' leaks to the office."

19. Cutler commented in the press that she feels sorry for those people that write blogs for years and never obtain a book deal.
20. In responding to what she has done with her new found wealth resulting from her lucrative book deal, Cutler says "I guess you can buy more drugs."

21. Home Box Office purchased from Defendant Cutler the rights to make the book into a TV series and has started production thereof, which again invades Plaintiff's right to privacy.

VI. Cause of Action for Invasion of Privacy

a. Public Disclosure of Private Facts

22. Plaintiff repeats the previous paragraphs here.

23. DefendantsÆ actions of publishing and advertising their book, the Washingtonienne, and creating a TV series, constitute an invasion of Plaintiff's privacy, satisfying the elements of the tort of publication of private facts. Cutler caused widespread publication and publicity of private intimate facts concerning Plaintiff in a manner that would be deemed outrageous and highly offensive to

an ordinary reasonable person of average sensibilities, subjecting Plaintiff to severe emotional distress, humiliation, embarrassment, and anguish.

24. These disclosures were not made for any purposes relating to the dissemination of news or material published in the public interest and of no legitimate public concern. These disclosures were cruel and malicious exposures of the most intimate details of Plaintiff's life to the public.
25. These disclosures of private facts would be highly offensive to any reasonable person.

26. The invasions of privacy have caused Plaintiff to suffer severe emotional distress, humiliation, embarrassment, anguish, pain and suffering and have damaged him relative to his community.

b. Misappropriation

27. Through Defendants' actions of publishing and advertising their book, the Washingtonienne, and creating a TV series, Defendants misappropriated Plaintiff's likeness and identity in the text of and advertising for the book subject to this lawsuit. Defendant's profited from this misappropriation without the consent of or compensation to Plaintiff.

28. The invasions of privacy have caused Plaintiff to suffer severe emotional distress, humiliation, embarrassment, anguish, pain and suffering and have

damaged him relative to his community.

c. False Light

29. Through Defendants' actions of publishing and advertising their book, the Washingtonienne, and creating a TV series, Defendants portrayed Plaintiff falsely, putting him in false light, causing him harm.

30. The invasions of privacy have caused Plaintiff to suffer severe emotional distress, humiliation, embarrassment, anguish, pain and suffering and have damaged him relative to his community.

d. Intrusion Upon Seclusion

31. Through Defendants' actions of publishing and advertising their book, the Washingtonienne, and creating a TV series, Defendants actions intruded upon Plaintiff's right to seclusion.

32. The invasions of privacy have caused Plaintiff to suffer severe emotional distress, humiliation, embarrassment, anguish, pain and suffering and have damaged him relative to his community.

VII. Cause of Action for Intentional Infliction of Emotional Distress

33. Plaintiff repeats the previous paragraphs here.

34. Defendants' actions constitute outrageous conduct.

35. Plaintiff suffered severe emotional distress.

36. Defendants acted intentionally.

37. Defendants were reckless.

38. Defendants intended to cause Plaintiff to suffer damages.

39. Defendants' actions caused Plaintiff to suffer damages.

40. Defendants' actions have caused Plaintiff to suffer severe emotional distress, humiliation, embarrassment, anguish, pain and suffering and have damaged him relative to his community.

VIII. Prayer for Relief

Wherefore Plaintiff seeks compensatory and punitive damages in an amount in excess of $10,000,000, such other declaratory and injunctive relief as the Court shall deem appropriate, attorneys fees, costs and disbursements.

Dated: May 30, 2006

x/Jonathan Rosen
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Attorney for plaintiff

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No. 08-52

Supreme Court, U.S.
FILED
AUG 12 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

ROBERT STEINBUCH,

Petitioner,

v.

HYPERION BOOKS, DISNEY PUBLISHING WORLDWIDE, and HOME BOX OFFICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS HYPERION, AN IMPRINT OF BUENA VISTA BOOKS, INC., AND DISNEY PUBLISHING WORLDWIDE

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QUESTIONS PRESENTED

I. Whether petitioner has presented compelling reasons to grant the petition where the Eighth Circuit applied this Court's personal jurisdiction precedents to the facts in the record and held that petitioner failed to demonstrate a *prima facie* case that the respondents were subject to personal jurisdiction in Arkansas, and its opinion does not conflict with a decision of this Court or a Court of Appeals, and where the opinion below does not implicate an important federal question that has not been settled by this Court.

II. Whether petitioner has presented compelling reasons to grant the petition where the Eighth Circuit's opinion held that petitioner was not entitled to discovery on the issue of specific personal jurisdiction because petitioner offered only conclusory and speculative allegations supporting jurisdiction and did not contradict the affidavits of respondents with competent proof, where the Eighth Circuit remanded the case to permit petitioner to conduct discovery limited to general personal jurisdiction over respondent Hyperion even though petitioner did not seek to conduct discovery limited to jurisdictional issues when the case was before the District Court, and where the opinion is not in conflict with a decision of this Court or a Court of Appeals and does not implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT

Hyperion, an imprint of Buena Vista Books, Inc., states that it is a subsidiary of Disney Publishing Worldwide, which is an indirect subsidiary of The Walt Disney Company, a publicly traded company.

Disney Publishing Worldwide states that it is an indirect subsidiary of The Walt Disney Company, a publicly traded company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Counterstatement of the Case	1
I. Statement of Facts	1
II. Procedural History	5
Reasons for Denying the Writ	9
I. The Court of Appeals Applied This Court's Personal Jurisdiction Precedents, and the Decision Does Not Conflict with a Decision of This Court or Implicate an Important Federal Question That Has Not Been Settled by This Court	9
II. The Decision of the Court of Appeals Does Not Conflict with a Decision of any Other Circuit Court of Appeals	17
Conclusion	21

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987) 11, 12

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 14, 15, 16, 17

Calder v. Jones, 465 U.S. 783 (1984) 12, 13

CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) 17, 18, 19

Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001) 20

FC Inv. Group LC v. IFX Markets, Inc., 529 F.3d 1087 (D.C. Cir. 2008) 19

Hanson v. Denckla, 357 U.S. 235 (1958) 10

Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) 12

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 10

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 12, 15, 17

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981) 20

Milliken v. Meyer, 311 U.S. 457 (1940) 10

Negron-Torres v. Verizon Communication, Inc., 478 F.3d 19 (1st Cir. 2007) 20

Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266 (5th Cir. 2006) 20

TABLE OF AUTHORITIES – Continued

Page

Theunissen v. Matthews, 935 F.2d 1454 (6th Cir. 1991) 17, 18

World Wide Ass'n of Specialty Programs and Schools v. Houlahan, 138 Fed. Appx. 50 (10th Cir. 2005) 20

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 10, 11

COUNTERSTATEMENT OF THE CASE

I. Statement of Facts

Petitioner Robert Steinbuch filed suit in the United States District Court for the Eastern District of Arkansas against, among others, respondents Disney Publishing Worldwide ("DPW") and Hyperion, an imprint of Buena Vista Books, Inc. ("Hyperion") (collectively, the "respondents"). Hyperion and DPW are both California corporations with their principal places of business in California. Hyperion is a subsidiary of DPW. In his complaint, Mr. Steinbuch made no jurisdictional allegations against Hyperion or DPW. He sought damages for invasion of privacy and intentional infliction of emotional distress based on the publication of *The Washingtonienne*, a work of fiction published by Hyperion in June 2005.

In addition to the respondents, Mr. Steinbuch sued Jessica Cutler, who wrote the novel *The Washingtonienne*.[1] For a brief time during 2004, Ms. Cutler posted a weblog or "blog," also called "The Washingtonienne," in which Ms. Cutler described her dating life and sexual relationships in and around Washington, D.C. with several men, including one she referred to as "R.S." In May 2005, before the publication of the novel *The Washingtonienne*, Mr. Steinbuch sued Ms. Cutler in Washington, D.C. for invasion of

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[1] The Eighth Circuit Court of Appeals has stayed Mr. Steinbuch's appeal of the District Court's dismissal of Ms. Cutler pending her bankruptcy proceedings.

privacy and intentional infliction of emotional distress, claiming in his publicly-filed complaint that he was "R.S." and confirming that he had a sexual fling with Ms. Cutler when they both worked in the same office in Washington, D.C.[2] The novel *The Washingtonienne* is a work of fiction, and, as the Eighth Circuit Court of Appeals correctly noted, "[t]he novel concerns fictional characters and does not refer to Steinbuch by name or by his initials."[3]

Mr. Steinbuch was a resident of Arkansas at the time he filed his complaint in May 2006, but he did not have any connection to the State of Arkansas prior to his accepting employment in Arkansas. Mr. Steinbuch presented no evidence to the District Court that he was a resident of Arkansas at the time *The Washingtonienne* was published, nor did he make such an allegation in his complaint.

In response to petitioner's complaint, both Hyperion and DPW presented evidence in the form of affidavits that neither entity had jurisdictional contacts in Arkansas.

Hyperion's affidavit states that it has no employees or agents in Arkansas; it has no bank accounts,

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[2] *Steinbuch v. Cutler*, United States District Court for the District of Columbia No. 1:05-cv-00970-PLF.

[3] *Steinbuch v. Cutler*, 518 F.3d 580, 583-84 (8th Cir. 2008). A copy of the opinion is attached as Appendix A to the petition for writ of certiorari ("Pet. Appx. A"), and citations to the opinion in this brief are to that copy of the opinion.

telephone listings, real estate, or personal property in Arkansas; it has no office in Arkansas; and it has no agent for service of process in Arkansas.

Hyperion also submitted an affidavit stating that it contracted with Time Warner Book Group, Inc., which is now Hachette Book Group ("HBG"), for the distribution of books published by Hyperion. Hyperion does not own HBG and they are not joint ventures. HBG had the exclusive right to distribute *The Washingtonienne*. The distribution agreement with HBG provided for broad distribution of Hyperion's titles, including *The Washingtonienne*. Hyperion's affidavit stated that it did not direct HBG to target any of its books for distribution in the State of Arkansas or in any specific region of the country, nor did Hyperion directly sell *The Washingtonienne* to any consumers in Arkansas or any other state.

DPW stated in its affidavit that during the relevant time period, that is, from the time *The Washingtonienne* was published through the time of the petitioner's filing of his complaint, DPW had no bank accounts, telephone listings, real estate, or personal property in Arkansas; it did not maintain an office in Arkansas; and it had no agent for service of process in Arkansas. In September 2006, four months after Mr. Steinbuch filed his original complaint, and well after the petitioner's alleged cause of action arose, DPW registered to do business in Arkansas. DPW's affidavit also stated that it did not publish or distribute *The Washingtonienne*. It did not contract with Ms. Cutler for the publication of *The Washingtonienne*, and

it did not make any payments to Ms. Cutler. DPW did not contract with Time Warner Book Group, Inc., HBG, or any other entity for the distribution of *The Washingtonienne*.

The affidavits also stated that Hyperion and DPW are separate corporate entities. Hyperion is not an agent of DPW, and it does not hold itself out to be an agent of DPW. Hyperion and DPW maintain separate books, records, and accounts. DPW does not control the business operation and affairs of Hyperion, and it does not approve significant business decisions made by Hyperion. The only connection DPW has to this action is that it is the corporate parent of Hyperion.

In opposition to the respondents' affidavits, the petitioner submitted no affidavits of his own or other testimony or competent evidence to demonstrate that Hyperion and DPW had any affirmative contacts with Arkansas. Instead, he cited newspaper articles and advertisements from publications outside of Arkansas, such as Cleveland, Ohio and Hartford, Connecticut, that loosely mentioned "Disney" and Hyperion together. He also attached a list of books published by Hyperion found in Arkansas stores. The petitioner also tried to demonstrate involvement by DPW in this matter by citing the margins of the distribution agreement between Hyperion and HBG in which a footer at the bottom of each page read "CFR/Disney Agreement. 12.04.03(v5)." As the Eighth Circuit correctly observed, however, in finding that DPW was not a party to the distribution agreement, "the plain

language of the agreement excludes 'books published by [Hyperion's] parent company, The Walt Disney Company, and companies which are owned or controlled by The Walt Disney Company (other than [Hyperion]).'" *Steinbuch*, Pet. Appx. A, p. 17.

II. Procedural History

Hyperion and DPW moved to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction based on the facts outlined above. The record below shows that Mr. Steinbuch had ample opportunity to move for jurisdictional discovery but failed to do so. The petitioner asked counsel for DPW and Hyperion to agree to an extension of time of nearly three months to respond to the motions to dismiss. DPW and Hyperion were agreeable to this lengthy extension, but only if petitioner would agree to stay discovery until the motions were decided so as to avoid broad discovery requests and risk waiving their personal jurisdiction claims. DPW and Hyperion also offered to consider a shorter extension of time for Mr. Steinbuch to respond to the pending motions without a stay of discovery. Mr. Steinbuch refused both offers and moved the District Court for a three-month extension of time to respond to the pending motions. Hyperion and DPW moved to stay discovery pending a decision on the motions. The District Court permitted Mr. Steinbuch a two-month extension of time to respond to the motions to dismiss and also granted the respondents' motion to stay discovery. As the Eighth Circuit Court observed, in

his opposition to respondent's motion for a stay of discovery, Mr. Steinbuch "made no explicit request to conduct limited discovery tailored to the specific issue of personal jurisdiction." *Steinbuch*, Pet. Appx. A, p. 5. Mr. Steinbuch did not state in his opposition to the respondents' motions to dismiss that he needed jurisdictional discovery to respond to the motions, much less state with specificity what discovery he would need, and he never filed a motion with the District Court, as he was entitled to do, seeking leave to serve discovery limited to jurisdictional issues on Hyperion or DPW.

The District Court granted the respondents' motions to dismiss, finding that Arkansas lacked specific personal jurisdiction over Hyperion and DPW because Mr. Steinbuch's alleged injury and cause of action did not arise out of the respondents' contacts with the State of Arkansas. The District Court also found that it lacked general personal jurisdiction over Hyperion and DPW because the respondents' contacts with the State of Arkansas were not continuous, systematic, and substantial.

Mr. Steinbuch appealed. The Eighth Circuit affirmed the dismissal as to DPW for lack of both general and specific jurisdiction and affirmed the lack of specific jurisdiction over Hyperion, but remanded on the issue of general jurisdiction over Hyperion.

In affirming dismissal for lack of general jurisdiction over DPW, the Court of Appeals found that Mr. Steinbuch failed to set forth "factual" and "credible"

evidence to refute DPW's affidavits denying continuous and systematic contacts with Arkansas. It specifically held that the petitioner

> failed to meet his burden of proving jurisdiction by providing any affidavits, testimony, or documents in response to [DPW's] affidavit denying control over Hyperion and challenging personal jurisdiction. Steinbuch merely submitted various newspaper articles which referred to Hyperion/Disney as publisher of *The Washingtonienne*. The articles did not establish that Disney controls Hyperion and therefore did nothing to refute Disney's affidavit.

Steinbuch, Pet. Appx. A, p. 16-17.

The Court of Appeals also held that the District Court did not err in refusing to exercise specific jurisdiction over DPW, finding that there was credible evidence to show that DPW played no role in the publication or distribution of *The Washingtonienne* and that the petitioner failed to present any evidence that DPW had any connection with the dispute, but rather offered only conclusory and speculative assertions.

The Court of Appeals also affirmed the District Court's finding that it lacked specific personal jurisdiction over Hyperion, finding that Mr. Steinbuch did not present evidence that he was a resident of Arkansas when his cause of action arose, that is, when *The Washingtonienne* was published, and because "Steinbuch's cause of action appears to have no direct

connection with the forum state or to have arisen out of or relate to Hyperion's activities in Arkansas." *Steinbuch*, Pet. Appx. A, p. 10.

On the issue of general jurisdiction over Hyperion, however, the Eighth Circuit found that, since the petitioner submitted a list showing that some Hyperion books were sold within Arkansas, and because the distribution agreement, while not specifically targeting any state, left open the possibility that Hyperion could play a role in the marketing and distribution of its books, there was a possibility that Hyperion "might" have reasonably expected their distribution in Arkansas. *Steinbuch*, Pet. Appx. A, p. 15. The Court of Appeals noted, however, that the record did not contain "sufficient proof for a *prima facie* case of general personal jurisdiction over Hyperion." *Steinbuch*, Pet. Appx. A, p. 15. It noted that the petitioner "has not shown enough specifics about the quality and quantity of Hyperion's contacts with the state or the publisher's exploitation of the Arkansas market." *Steinbuch*, Pet. Appx. A, p. 15. The Court of Appeals thus remanded "for an opportunity for tailored discovery to elicit whether [Hyperion's] contacts with Arkansas were so continuous and systematic as to warrant general personal jurisdiction over the publisher." *Steinbuch*, Pet. Appx. A, p. 15.

The Eighth Circuit denied Mr. Steinbuch's petition for rehearing and his motion to stay the mandate pending his petition for a writ of certiorari. Upon remand, Mr. Steinbuch moved to transfer his case against Hyperion to Washington, D.C. The District

Court denied the motion to transfer. Limited discovery on the issue of general jurisdiction over Hyperion in Arkansas, pursuant to the Eighth Circuit's mandate, has begun in the District Court.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Applied This Court's Personal Jurisdiction Precedents, and the Decision Does Not Conflict with a Decision of This Court or Implicate an Important Federal Question That Has Not Been Settled by This Court.

This case represents a routine and proper application of this Court's jurisdictional precedents. There is nothing extraordinary about the way the Court of Appeals considered the affidavits of the respondents' corporate officers against the absence of credible evidence offered by the petitioner, who presented no "affidavits, testimony, or documents" but rather only newspaper clippings that referred to the companies by informal names, and other speculative and conclusory material. *Steinbuch*, Pet. Appx. A, p. 16. Nor is there anything unusual or controversial in the way the Court of Appeals affirmed dismissal of DPW and found that there was no specific jurisdiction over Hyperion without ordering jurisdictional discovery. The petitioner never moved for jurisdictional discovery when he had the opportunity to do so in the District Court and, in any event, he failed to carry his burden by presenting sufficient evidence that discovery was

warranted. The Eighth Circuit Court of Appeals properly applied this Court's precedents in a way that is consistent with how such jurisdictional issues are handled in other Circuits. No important federal question is implicated, and there is no Circuit split. This Court should deny the petition for a writ of certiorari.

As this Court has explained, the power of a state to exercise jurisdiction over a nonresident defendant is limited by the Due Process Clause of the Fourteenth Amendment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Under the Due Process Clause, to subject a nonresident defendant to jurisdiction, the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Whether a forum state's exercise of jurisdiction over a nonresident defendant comports with the requirements of due process "depend[s] . . . upon the quality and nature of [its] activity" in the forum state. *International Shoe Co.*, 326 U.S. at 319. Accordingly, a personal jurisdictional analysis properly focuses on whether the nonresident defendant has the requisite "minimum contacts" with the forum, which "protects the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp.*, 444 U.S. at 291; *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("[I]t is essential in each case

that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

It is the petitioner who has failed to recognize this Court's precedents by insisting on applying a simple "stream of commerce" theory to this case. The petitioner argues erroneously that because a defendant's products are ultimately sold in a state, a defendant is therefore subject to personal jurisdiction in that state. The Court's holding in *World-Wide Volkswagen* forecloses such argument because "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." 444 U.S. at 229. In order for a defendant's contacts with a state to be "constitutionally cognizable," it must be foreseeable "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297 ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State."); see also *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987) (plurality opinion).

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . [A] defendant's awareness that the stream of commerce may or

> will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Asahi Metal, 480 U.S. at 113.

The opinions below analyzed Hyperion's and DPW's contacts with Arkansas to determine whether it was foreseeable that these respondents would be subject to jurisdiction in Arkansas under this Court's two theories of personal jurisdiction – specific jurisdiction and general jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984). "When a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Id.* at n. 8. On the other hand, "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the state [is] exercising 'general jurisdiction' over the defendant." *Id.* at n. 9. In order to support a finding of general personal jurisdiction, it is not enough that a defendant has some general presence in a state. Instead, a nonresident defendant's contacts with the forum must be "continuous and systematic." *Id.* at 415.

The Court of Appeals properly applied this Court's decisions in *Calder v. Jones*, 465 U.S. 783 (1984), which analyzed a claim of specific personal jurisdiction, and *Keeton v. Hustler Magazine, Inc.*, 465

U.S. 770 (1984), which examined a claim of general personal jurisdiction.

The defendants in *Calder* did not have the kind of continuous and systematic contacts with California necessary to support a finding of general personal jurisdiction, but because they had "intentionally directed" their activities at a resident of California they were subject to specific jurisdiction in that state. *Calder*, 465 U.S. at 789-90 (finding that defendants' intentional, and allegedly tortious, actions were expressly aimed at California"). Thus under *Calder*, in order to support a finding of specific personal jurisdiction, a nonresident defendant must intentionally direct his tortious activity to a resident of the forum state.

The Court of Appeals, following *Calder*, found that the petitioner failed to present sufficient evidence justifying an Arkansas court's exercise of specific personal jurisdiction over Hyperion and DPW because neither had targeted an Arkansas resident with tortious conduct. The Court of Appeals noted that under *Calder* petitioner "would have to show that Hyperion knew 'that the brunt of the injury would be felt by [him] in the State in which [he] lives and works.'" *Steinbuch*, Pet. Appx. A, p. 9 (quoting *Calder*, 465 U.S. at 789-90). But the petitioner failed to allege or present evidence that he was an Arkansas resident when his cause of action arose. The Court of Appeals correctly found that the "cause of action appears to have no direct connection with the forum state or to have arisen out of or relate to Hyperion's

activities in Arkansas." *Steinbuch*, Pet. Appx. A, p. 10 (applying *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Petitioner states erroneously that he presented "evidence" of DPW's "direct involvement in the publication of the book." Petition for Writ of Certiorari 14. The Court of Appeals rejected this claim, stating that the petitioner "offered no credible evidence that [DPW] had any involvement in the publication or distribution of the novel and instead made merely conclusory allegations about [DPW's] alleged role." *Steinbuch*, Pet. Appx. A, p. 18. The Court of Appeals found that "[petitioner] merely submitted various newspaper articles which referred to Hyperion/Disney as publisher of *The Washingtonienne*. The articles did not establish that [DPW] controls Hyperion and therefore did nothing to refute DPW's affidavit." *Steinbuch*, Pet. Appx. A, p. 17.

The Court of Appeals also rejected the petitioner's other piece of "evidence," which consisted of a footer on the margins of the distribution agreement between Hyperion and its distributor that says "CFR/Disney Agreement.12.04.03." The Court of Appeals found that

> [e]ven a cursory look at the distribution agreement, however, shows that it was entered into by the distributor . . . and three publishers, not including Disney Publishing Worldwide. The plain language of the agreement excludes "books published by Publisher's parent company, The Walt Disney Company,

> and companies which are owned or controlled by the Walt Disney Company (other than Publisher)." The distribution agreement thus cannot serve to establish personal jurisdiction over [DPW].

Steinbuch, Pet. Appx. A, p.17. The Court of Appeals' determination that neither Hyperion nor DPW were subject to specific jurisdiction in Arkansas is consistent with this Court's precedents.

In *Keeton*, this Court considered whether a publisher that directly circulated 15,000 magazines a month in New Hampshire was subject to general personal jurisdiction in that state. The Court found that Hustler Magazine, Inc.'s "general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state." *Keeton*, 465 U.S. at 774. Thus, general jurisdiction over the foreign defendant was proper because it "purposefully availed" itself of the benefits and protections of doing business in New Hampshire. *Id.*; see also *Burger King Corp.*, 471 U.S. at 475 (citing *Keeton*, 465 U.S. at 774).

The Court of Appeals applied *Keeton* to find that petitioner failed to present any factual evidence to contradict DPW's affidavit, which established a lack of continuous and systematic contacts with Arkansas during the relevant time period. There was no factual evidence in the record to support a finding that DPW "purposefully availed" itself of the benefits and

protections of transacting business in Arkansas. *Burger King Corp.*, 471 U.S. at 475.

As for Hyperion, however, the Court of Appeals found that because the petitioner presented evidence that Hyperion books were for sale in Arkansas, and because the distribution agreement, while not targeting any specific state or region, held open the *possibility* that Hyperion engaged in marketing efforts with the distributor or received sales reports from the distributor, Hyperion "might have reasonably expected" that its books would be distributed in Arkansas. *Steinbuch*, Pet. Appx. A, p. 13-14. The Court of Appeals, however, correctly determined that although the evidence raised the possibility that Hyperion might be subject to general jurisdiction in Arkansas, the petitioner "has not adduced sufficient proof for a *prima facie* case of general personal jurisdiction over Hyperion." *Steinbuch*, Pet. Appx. A, p. 15. The Court of Appeals gave the petitioner a second chance to make that *prima facie* case by remanding to give petitioner "an opportunity for tailored discovery to elicit whether [Hyperion's] contacts with Arkansas were so continuous and systematic as to warrant general personal jurisdiction over the publisher." *Steinbuch*, Pet. Appx. A, p. 15. In rejecting the petitioner's simple stream of commerce theory and in ordering tailored discovery on whether Hyperion's contacts were so continuous and systematic as to warrant exercising general jurisdiction over it, the Court of Appeals applied this Court's precedents

under *Keeton* and *Burger King* in requiring the petitioner to meet his initial burden. The Court of Appeals' decision to remand is entirely consistent with this Court's precedent.

II. The Decision of the Court of Appeals Does Not Conflict with a Decision of any Other Circuit Court of Appeals.

The Court of Appeals' decision is in harmony with the practice in other Circuits, which routinely denies jurisdictional discovery when a plaintiff presents nothing more than speculative and conclusory allegations in opposition to a motion to dismiss for lack of personal jurisdiction that is supported by affidavits. Petitioner attempts to create a Circuit split on the issue of whether or not a court should rely on a defendant's affidavit on a motion to dismiss for lack of personal jurisdiction, but, in fact, the issue is illusory and no such split exists. In his petition, Mr. Steinbuch relies exclusively on *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991) and *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) to argue that the opinion below is in conflict with the law of other Circuits. The Eighth Circuit's opinion, however, is consistent with these two Sixth Circuit opinions and differs only in the application of the law to different factual situations.[4]

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[4] Throughout his petition, Mr. Steinbuch misstates that *Theunissen* is a Third Circuit instead of a Sixth Circuit opinion.

In *Theunissen*, *both* the plaintiff and defendant submitted affidavits regarding jurisdiction, a factual situation not present here. *Theunissen*, 935 F.2d at 1458 ("[T]he parties have together submitted a total of five affidavits in support of their respective positions."). In *Theunissen*, the Sixth Circuit found that the trial court had erred by crediting the defendant's affidavits denying jurisdictional facts while ignoring the plaintiff's affidavits that affirmatively averred facts that would support jurisdiction. *Id.* at 1462-63. Because the affidavits were contradictory, the court held that an evidentiary hearing should have been held to determine which factual account was accurate. *Id.* at 1465. Here, because the petitioner failed to present any affidavits contradicting the factual assertions in respondents' affidavits, the procedural recommendation in *Theunissen* does not apply to this case.

On the issue of whether or not a remand for further jurisdictional discovery is warranted, *Theunissen* is in accord with the opinion below. The Sixth Circuit found that the district court did not abuse its discretion in denying the motion for further discovery because plaintiff already had an opportunity to conduct discovery but failed to do so. Here, Mr. Steinbuch did not even move for jurisdictional discovery even though he had an opportunity to do so. Based on *Theunissen*, it was not an abuse of discretion to deny Mr. Steinbuch jurisdictional discovery.

CompuServe is also factually distinguishable from this case and presents no substantive Circuit

conflict. In *CompuServe*, the Sixth Circuit faulted the district court for relying on the defendant's affidavit denying jurisdictional facts because in that case, unlike here, plaintiff had submitted a wealth of competent evidence that, collectively, made out a *prima facie* case of specific jurisdiction over the defendant. The Court of Appeals in *CompuServe* found that "there is no question" that defendant took affirmative actions that created a connection with Ohio in that case, including repeated and ongoing communications with CompuServe, an Ohio company, entering into a written contract with CompuServe, which provided for the application of Ohio law, and purposefully perpetuating his relationship with the Ohio company by using it to market his software in Ohio. 89 F.3d at 1262-65. *CompuServe* does not conflict with the Eighth Circuit's opinion in this case but rather highlights Mr. Steinbuch's failure to present any credible evidence to challenge the respondents' affidavits.

The opinion of the Court of Appeals below is also consistent with other Circuits regarding the burden on the plaintiff to present competent evidence, and not merely speculative and conclusory allegations, to withstand to a motion to dismiss for lack of personal jurisdiction and to be afforded the opportunity to take jurisdictional discovery. See, *e.g.*, *FC Inv. Group LC v. IFX Markets, Inc.*, 529 F.3d 1087, 1093-94 (D.C. Cir. 2008) (holding that a *prima facie* case of personal jurisdiction and requests for jurisdictional discovery "cannot be based on mere conjecture or speculation");

Negron-Torres v. Verizon Communication, Inc., 478 F.3d 19, 27 (1st Cir. 2007) ("Because [plaintiff] has failed to make a colorable claim for personal jurisdiction, we have no reason to overturn the district court's denial of her request for jurisdictional discovery."); *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 277 (5th Cir. 2006) (affirming district court's denial of jurisdictional discovery where the discovery "would support the exercise of general, not specific, jurisdiction, something [plaintiff] has not alleged in this case"); *World Wide Ass'n of Specialty Programs and Schools v. Houlahan*, 138 Fed. Appx. 50, 52 (10th Cir. 2005) ("In the absence of an explicit, supported motion for discovery, this court cannot say that the district court abused its discretion in denying the request."); *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (noting that a district court may consider defendants' affidavits to assist it in its determination of a motion to dismiss for lack of personal jurisdiction); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) ("In deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion."). There is no conflict between the Eighth Circuit's opinion in *Steinbuch* and the opinion of any other Circuit. The Court should deny the petition for writ of certiorari.

CONCLUSION

Petitioner has not established any reason for this Court to grant his petition. The opinions below were fully consistent with the law governing personal jurisdiction established by this Court. The opinion of the Court of Appeals does not conflict with a decision of this Court or any Circuit Court of Appeals, and it does not implicate an important federal question that has not been settled by this Court. For all of these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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NO. 08-52

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT STEINBUCH,

Petitioner,

v.

HYPERION BOOKS,
DISNEY PUBLISHING WORLDWIDE,
and
HOME BOX OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FOR RESPONDENTS HYPERION BOOKS AND DISNEY PUBLISHING WORLDWIDE AND SUPPLEMENTAL BRIEF [COMBINED]

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QUESTIONS PRESENTED FOR REVIEW [CORRECTED]

Respondent has noted Petitioner's counsel's error in misidentification of the Sixth Circuit's decision in *Theunissen v. Matthews* as a decision of the Third Circuit. Because the error implicates the extent of the split in circuits warranting this Court's review, Petitioner restates the Questions Presented for Review to correct the error in designation and typographical error in citation to the case.

I. [CORRECTED]

WHETHER PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT IN *THEUNISSEN v. MATTHEWS*, 935 F.3d 1454, 1459 (6th Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996).

II.

WHETHER THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).

III.

THE EIGHTH CIRCUIT ERRED IN UPHOLDING DISMISSAL OF PETITIONER'S ACTION AGAINST HOME BOX OFFICE (HBO) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WHERE PETITIONER SUED FOR INJUNCTIVE RELIEF TO PREVENT HBO FROM PRODUCING AND AIRING A TELEVISION SERIES BASED ON *THE WASHINGTONIENNE* THAT WOULD EXPOSE HIM TO FURTHER VIOLATIONS OF HIS RIGHT OF PRIVACY.

TABLE OF CONTENTS

Questions Presented for Review [Corrected] 1-2

Table of Cases 5

Petitioners Reply and Supplemental Brief 7

I. PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT IN *THEUNISSEN v. MATTHEWS*, 935 F.3d 1454, 1459 (6th Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996). 7

A. The circuit split 8

B. "Failure" to seek jurisdictional discovery 13

II. THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT

YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).... 15

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Conclusion 21

TABLE OF CASES

United States Supreme Court decisions:

Calder v. Jones, 465 U.S. 783 (1984) 16-17

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). 16

Keeton v. Hustler, Inc., 465 U.S. 770 (1984). . . . .*passim*

Lower federal court decisions

Compuserve, Inc. v. Patterson, 89 F.3d 1657 (6th Cir. 1996). 7, 8. 9, 12

Steinbuch v. Cutler, et al., 518 F.3d 580 (8th Cir. 2008). . . . . *passim*

Theunissen v. Matthews, 955 F.3d 1454 (6th Cir. 1994). . . . . .*passim*

PETITIONER'S COMBINED REPLY BRIEF AND SUPPLEMENTAL BRIEF

Petitioner Robert Steinbuch files this combined reply brief and supplemental brief pursuant to sections 5, 6 and 8 of Rule 15 of the Rules of this Court. Petitioner's reply is addressed to the Brief in Opposition filed on behalf of Respondents Hyperion Books and Disney Worldwide Publishing. Petitioner's supplemental brief references "intervening matter" relevant to the third Question Presented relating to his claim against Respondent Home Box Office.

I. [CORRECTED]

PETITIONER WAS DENIED HIS RIGHT TO RELY ON THE ARKANSAS LONG-ARM JURISDICTION STATUTE IN HIS DIVERSITY ACTION AGAINST DISNEY PUBLISHING WORLDWIDE BASED ON DISNEY'S SELF-SERVING AFFIDAVIT DENYING ALL JURISDICTIONAL FACTS WITHOUT BEING AFFORDED ANY OPPORTUNITY FOR JURISDICTIONAL DISCOVERY TO REBUT THAT AFFIDAVIT, IN CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT IN *THEUNISSEN v. MATTHEWS*, 935 F.3d 1454, 1459 (6th Cir. 1994) AND *COMPUSERVE INC. v. PATTERSON*, 89 F.3d 1657, 1626 (6th Cir. 1996).

At the outset, Petitioner recognizes the correction noted by Respondent to his reference to the decision of the Sixth Circuit in *Theunissen v. Matthew*, 935 F.2d 1454 (6th Cir. 1991). Petitioner incorrectly identified this as a decision rendered by the Third Circuit, while the citation in the argument section of his petition appears to be correct in identifying the Sixth Circuit as the court issuing the opinion. However, Petitioner also notes that both the reference to the Third Circuit and the citation to the case in the Question Presented are incorrect. Petitioner concedes that the error in the first question presented and in his discussion of the case in the argument are not merely technical mistakes because he has relied on *Theunissen* in support of his discussion of the still existing circuit split. In fact, the corrected reference supports an argument that the Eighth Circuit's holding below is only in conflict with the Sixth Circuit's position.

A. The circuit split

The plaintiffs' affidavits noted by the court in *Theunissen* and *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) were necessary to show that the non-residents actually conducted business in the forum, i.e., establishing general jurisdiction, rather than simply relying on the factual allegations in their pleadings. *Theunissen*, 935 F.2d at 1458. Here, Petitioner's allegations and evidence were sufficient to demonstrate that the threshold for jurisdiction against Disney was

met as the District Court found: "Steinbuch is an Arkansas resident. Hyperion, Disney, HBO and Warner sell their products or services in this state." [Order, at 9]. The issue here, rather, was whether Steinbuch is required to provide affidavit evidence that Disney committed the torts in question.

The issue here, rather, is whether Steinbuch was required to provide affidavit evidence that Disney committed the torts in question. The courts below essentially required Petitioner to offer a personal affidavit—rejecting the aforedescribed public and other data about Disney's involvement—to counter the self-serving affidavits of Disney and Hyperion claiming that Disney was not involved in the production of the book. How could he possibly do so when the District Court prevented Steinbuch from taking any discovery whatsoever?

The Sixth Circuit cautioned against relying on self-serving affidavits "to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts." 935 F.2d at 1459. Later, in *CompuServe*, that court reiterated this view, holding that dismissal for lack of jurisdiction is proper "only if all the specific facts which the plaintiff (CompuServe) alleges collectively fail to state a prima facie case for jurisdiction." 89 F.3d at 1262.

The District Court's key finding was: "Jurisdiction over Disney does not automatically follow because of the actions of its wholly-owned subsidiary." [Order, at 13]. In concluding that Petitioner had failed to meet his burden of producing controverting evidence on the question of jurisdiction, the court noted:

> Disney produced an affidavit from its senior vice president stating that Disney is the parent of Buena Vista Books and does not control the business operations and affairs of Buena Vista Books. The affidavit further states that Disney did not publish *The Washingtonienne*, did not enter into a contract with Cutler, never paid Cutler, and had nothing to do with distribution of the book.

[Order, at 13]. Although Respondent's counsel also represented Cutler in the trial court, it did not provide an affidavit from her denying any relationship or transaction with Disney.

The Eighth Circuit found that Petitioner's evidence failed to demonstrate that Disney had any connection with the dispute because there was no "credible" evidence showing that it played any role in the publication or distribution of the book. *Steinbuch v. Cutler, et al*, 518 F.3d 580, 590 (8th Cir. 2008). But Petitioner did provide such evidence from public sources and was deprived of any opportunity to further

develop this evidence because the District Court stayed all discovery pending disposition of Respondent's Motion to Dismiss.

Indeed, Steinbuch offered significant documentary evidence that Disney was involved in the publication and marketing of Cutler's book. He provided publicly available information including newspaper articles from national and international publications or internet sites all indicating that Disney was involved in the production tortious book subject to this suit. The publications included: *Cleveland Plain Dealer; The Agora* (Salon.com); *Hartford Courant; The Post-Standard* (Syracuse, New York); *The Mercury* (Australia); *The New York Times; The Observer* (Guardian Newspapers). [Exhibit 1 to Plaintiff's brief in opposition to Defendants' Motions to Dismiss]. This provided prima facie evidence of Disney's involvement in the tortious behavior, but the District Court rejected it on the grounds that newspapers are not generally admissible. The record also included a copy of Hyperion's contract with Defendant Cutler, and Buena Vista's distribution agreement with Time Warner that references both Hyperion and Disney. Nevertheless, at the same time, the District Court prevented the Petitioner from further developing evidence through its order staying all discovery.

Unlike the factual issues in *Theunissen* and *Compu-*

Serve, in which the plaintiffs' supporting evidence was necessary to show that non-resident defendants had intentionally penetrated local markets—issues upon which those plaintiffs logically could have provided affidavits on personal knowledge, the unresolved issue in Petitioner's case did not involve Disney's actual conduct of business in Arkansas at all. That finding had been made by the District Court. Rather, the unresolved issue focused on Disney's relationship with its wholly-owned subsidiary, Hyperion. The court below, as Respondent notes [BIO, 14-15], rejected Petitioner's supporting evidence because the newspaper articles did not "directly" refute Disney's affidavit and the publication agreement limited its terms to Hyperion's publications.

The burden imposed on Petitioner by the lower courts would be virtually impossible for any plaintiff to discharge where the non-resident corporation's affidavit asserts facts relating to the operations and management of the parent and subsidiary companies that is not within the personal knowledge of the plaintiff. Here, Petitioner's inability to controvert the self-serving claims of Disney and Hyperion regarding their internal business relationship beyond the publicly available evidence that he presented due to the stay of discovery presents an insurmountable *Catch-22*.

The denial of any discovery opportunity functionally prevented Petitioner from controverting the allegation that Hyperion functions entirely independently

of its parent, Disney. It is in this sense, that the Eighth Circuit diverges from the holdings of *Theunissen* and *CompuServe*. In Petitioner's case, the lower courts did precisely what the Sixth Circuit warned against in permitting Disney to escape jurisdiction without affording Steinbuch a reasonable opportunity to further develop controverting evidence through jurisdictional discovery.

B. "Failure" to seek jurisdictional discovery

The Eighth Circuit found that Petitioner had not sought to engage in jurisdictional discovery:

> Defendants asked the court to stay discovery pending its ruling on their dismissal motions because they wanted to avoid potentially broad discovery requests and the risk of waiving their jurisdictional claims before their motions were ruled on. Steinbuch filed a motion opposing a stay of discovery; the motion made no explicit request to conduct limited discovery tailored to the specific issue of personal jurisdiction. The district court allowed Steingbuch an extension of about two months to file his reply [to the dismissal motions] but granted the defense motion to stay discovery until ruling on the motions.

Steinbuch, 518 F.3d at 584-85.

In fact, however, Steinbuch had expressly argued his need for discovery to develop jurisdictional facts in his response to Respondent's motion for stay:

> . . . Steinbuch has not had the opportunity to take any discovery whatsoever, and one obvious area for required discovery is regarding Defendant's claims as to why this case should be dismissed. *See e.g., PST Services, Inc. v. Larson*, 221 F.R.D. 33, 37 (N.D.N.Y. 2004) (discovery permitted for plaintiffs that have made sufficient start toward establishing jurisdiction and have shown that their position is not frivolous); *Greenery Rehabilitation Group, Inc. v. Sabol*, 841 F. Supp. 58, 62 (N.D.N.Y. 1993) ("in a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, the part opposing the motion must be allowed discovery of facts demonstrating jurisdiction").

[Plaintiff's Response to Defendants' Motion to Stay Discovery, at 3]. The motion for stay was filed on August 30, 2006. Steinbuch filed his response on September 10, 2006. The trial court granted the motion and ordered a stay of "[A]ll discovery" on the following day, September 11, 2006.

Petitioner clearly indicated his need for jurisdictional discovery in his response to the motion to stay and the trial court presumably considered his response before ordering the stay. In essentially holding

that Petitioner had a further duty to request jurisdictional discovery after the trial court had rejected his initial request, the Eighth Circuit imposed a duty upon him that is, to Petitioner's knowledge, neither required, nor recognized by the federal rules.

I.

THE EIGHTH CIRCUIT ERRED IN ONLY REMANDING FOR JURISDICTIONAL DISCOVERY ON THE THEORY OF GENERAL JURISDICTION, BASED ON ITS CONCLUSION THAT STEINBUCH COULD NOT ASSERT SPECIFIC JURISDICTION BECAUSE HE WAS NOT A RESIDENT OF ARKANSAS AND FINDING THAT STEINBUCH HAD NOT YET SHOWED GENERAL JURISDICTION OVER HYPERION, AS THE DECISION IS WHOLLY CONTRARY TO *KEETON v. HUSTLER, INC.*, 465 U.S. 770 (1984).

Respondent argues that Petitioner has relied on a "simple stream of commerce theory" in arguing that the lower courts improperly failed to hold that he had shown sufficient evidence to establish general jurisdiction over non-resident defendant Hyperion. [BIO, at 11,16]. But this is a not a case in which Petitioner sought to assert long-arm jurisdiction over a supplier or manufacturer of a product sold to a distributor which then puts the product into interstate commerce, resulting in its purchase for retail sale by a retailer within the forum

state.

Instead, Hyperion deliberately published *The Wasingtonienne*, aware that Petitioner had already sued the author, Cutler, for disclosures on her website in the District of Columbia. Hyperion entered into a distribution agreement providing for a national marketing campaign that clearly included Arkansas. And Petitioner established that *The Washingtonienne* was listed with other Hyperion titles in Arkansas bookstores; had been purchased by bookstores within the state; and was available through the Central Arkansas Public Library system.

The continuing business operations of Hyperion in Arkansas through the distribution of its titles for sale in the state reflects precisely the type of continuous and systematic contacts with the state warranting the exercise of long-arm jurisdiction. *Heliocopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415 (1984). It is the type of ongoing enterprise activity that led this Court to uphold assertion of jurisdiction over the non-resident publisher in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

Moreover, Respondent's reliance on *Calder v. Jones*, 465 U.S. 783 (1984) is misplaced because there, the non-resident defendants were individual employees of the offending publication who themselves had no ties to the

forum state. *Id.* at 784-85. Instead, the publication, The Enquirer, was distributed in California, and carried an article allegedly libelous. These employees, the reporter and editor had not deliberately engaged in any activity targeting the plaintiff as a resident of California. The situation in *Calder* is not comparable to the theory of jurisdiction considered in *Keeton*, or here, where Petitioner has sued the non-resident corporate entities based on their ongoing business activity within the state.

III.

THE EIGHTH CIRCUIT ERRED IN UPHOLDING DISMISSAL OF PETITIONER'S ACTION AGAINST HOME BOX OFFICE (HBO) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED WHERE PETITIONER SUED FOR INJUNCTIVE RELIEF TO PREVENT HBO FROM PRODUCING AND AIRING A TELEVISION SERIES BASED ON *THE WASHINGTONIENNE* THAT WOULD EXPOSE HIM TO FURTHER VIOLATIONS OF HIS RIGHT OF PRIVACY.

The Eighth Circuit upheld dismissal of Steinbuch's claim for invasion of privacy and request for injunctive relief based the lower courts' conclusion that he could not demonstrate that HBO had actually produced any material, despite its concession that it had purchased the rights to the Disney/Hyperion book, *The Washingtonienne*. The court found:

> HBO concedes that it has acquired an option to develop a television series based on Cutler's novel but asserts that it has not published anything whatsovever about Steinbuch and thus has not invaded his privacy or caused injury.

518 F.3d at 591. Thus, it concluded that Steinbuch's claim was merely speculative:

> Steinbuch merely speculates that HBO might injure his privacy rights at some time in the future, and its parent corporation Time Warner is not even mentioned in the body of the complaint. (citation omitted) In light of the complaint's failure to allege a colorable claim against HBO and Time Warner, there would be no basis for injunctive relief against the mere possibility of a future television series based on Cutler's novel.

Id. Steinbuch's issue here focuses on the trial court's stay of discovery that deprived him of any opportunity to question the potential progress of the development of the HBO series.

In fact, however, recent public developments demonstrate that Steinbuch's concerns about HBO's intentions and progress were not speculative at all:

The WashingtonPost.com reported on July 11, 2008 that on July 10th, the same date as the due date for Steinbuch's cert petition, HBO had announced that its

Washingtonienne project was going forward:

> To that end, they've [HBO]given Sarah Jessica Parker's production company the thumbs up to make a pilot for an adaptation of the non-somber "Washingtonienne" novel. It's from former congressional staff assistant Jessica Cutler and was based on her blog of that same name, in which she detailed her interesting life in D.C., including an exhausting array of sexual encounters, some with government suits, some for cash because "how can anybody live on $25K/year?"

Lisa de Moraes, HBO Sees at Least One Big Picture (and Plenty of Shows) in its Future, The TV Column, WashingtonPost.com, July 11, 2008, Available at http://www.washingtonpost.com/wp-dyn/content/article/2008/07/10/AR20008071002890_html?referrer=emailarticle&sid=ST2000807103334&pos= (last visited, Aug. 20, 2008).

Similar reports appeared throughout the national news and entertainment press. *See e.g.*, Stuart Levine, Scorcese, Simon get HBO greenlights; Parker to exec produce "Washingtonienne," Variety.com (July 10, 2008) Available at http://www.variety.com/article/VR1117988772.html?categoryid=1300&cs=1 (last visited Aug. 20, 2008) (". . . the paybox is about to begin lensing the half-hour comedy

pilot . . . based on [Cutler's] sex life with real life figures on the D.C. political scene. Sarah Jessica Parker is exec producing and shooting will begin in the fall."); Bryan Stelter, HBO Orders Three Pilots, Including One Set in Post-Katrina New Orleans, NYTimes.com TVDecoder Blog (July 11, 2008), Available at http://tvdecoder.blogs.nytimes.com/tag/tca (last visited August 20, 2008); Lacey Rose, Welcome to HBO's Next Chapter, Forbes.com (July 11, 2008), Available at http://www.forbes.com/2008/07/11/hollywood-hbo-sopranos-bix-media-cx_lr_0711hbo.html (last visited Aug. 20, 2008) ("Included in the now 'embarrassment of riches,' as HBO co-president Plepler has dubbed the network's subsequent pipeline, is . . . *The Washingtonienne*, a Sarah Jessica Parker-produced Washington, D.C. comedy, based on Jessica Cutler's book. . ."); Claire Malone, Washington sex coming to HBO, Georgetown Voice/Vox Populi (July 11, 2008), Available at http://blog.georgetownvoice.com/2008/07/11/washington-sex-coming-to-hbo/ (last visited Aug. 20, 2008) ("HBO has just announced that it will shortly begin the filming of a pilot episoe for Washingtonienne, a TV series based upon former Senate staffer Jessica Cutler's District sexploits, which she so prudently parlayed into a chick-lit novel. The buzz promises to basically be a new *Sex and the City*."); and Kimberly Nordyke and James Hibberd, HBO orders pilots from Scorcese, "Wire" Creator, MSNBC.com (July 11, 2008) Available at http://www.msnbc.msn.com/id/2564671/ (last visited Aug. 20, 2008).

What these media sources show is that HBO was involved in the production of the television series throughout the course of the litigation in the courts below, yet Steinbuch was precluded from developing evidence of its activities as a result of the trial court's order staying all discovery. Steinbuch was not able to offer the type of evidence rebutting the argument that his claims were speculative by virtue of the denial of any opportunity to engage in discovery designed to remedy precisely the problem of proof noted by the courts below.

At this point it should be apparent that his cause of action is neither speculative, nor based on the possibility that his privacy rights will be injured "at some time in the future." For the protection of those privacy rights, that future is clearly now.

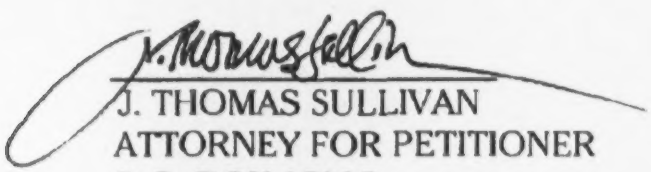
CONCLUSION

The trial court abused its discretion in denying Petitioner the opportunity to engage in discovery that would have permitted a fair opportunity for him to develop the very evidence the lower courts found lacking in his case. Moreover, the decision of the Eighth Circuit upholding the dismissal of his claims reflects an improper reliance on the self-serving affidavit of Disney and failure to properly apply *Keeton v. Hustler* in holding finding that he has yet to demonstrate sufficient contacts to warrant exercise of long-arm jurisdiction over

Hyperion. Finally, the newly-available evidence of HBO's development of the television series based on *The Washingtonienne* offered in this supplemental filing demonstrates the prejudice suffered by Petitioner as a result of the District Court's denial of discovery frustrating his ability to develop additional evidence to show that his cause of action had matured for purposes of his claim for injunctive relief to prevent further injury.

Petitioner prays the Court grant the petition and reverse the judgment of the court below.

Respectfully submitted,



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